BEFORE THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

Verizon West Virginia Inc.		
Petition in the matter of Verizon West Virginia Inc.'s compliance with conditions set forth in 47 U.S.C. § 271(C))))	Case No. 02-0809-T-P

RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY AT&T COMMUNICATIONS OF WEST VIRGINIA, INC.

Mark A. Keffer Michael McRae Ivars V. Mellups AT&T Communications of West Virginia, Inc. 3033 Chain Bridge Road Oakton, Virginia 22185 (703) 691-6046 Robert R. Rodecker BB&T Square – Suite 1230 P. O. Box 3713 Charleston, West Virginia 25337 (304) 343-1654

Attorneys for AT&T Communications of West Virginia, Inc.

Dated: November 26, 2002

TABLE OF CONTENTS

		Page No.
I.	Introduction and Summary	1
II.	West Virginia has Less Local Exchange Competition Than any State Where Verizon has Obtained § 271 Approval.	3
III.	This Commission Should Not Endorse Verizon's § 271 Application to the FCC Unless and Until Verizon Fully Complies With All Checklist Item Conditions.	8
A.	CHECKLIST ITEM 2 (UNE Pricing): The Establishment of UNE Rates That Will Facilitate Competition Is the Most Critical Telecommunications Issue Facing the Commission.	8
В.	CHECKLIST ITEM 1 (Collocation): Verizon Should be Required to Improve Its Processes for Issuing Credits to CLECs for the Return of Collocation Space and for Offering Reduced Collocation Prices to CLECs Willing to Utilize Returned Space.	24
C.	CHECKLIST ITEM 1 (Interconnection): Verizon Should Be Required to Offer All CLECs in West Virginia the Point Of Interconnection ("POI") Provisions and Language that the FCC Required Verizon to Implement in the AT&T/Verizon Virginia Interconnection Agreement Arbitration.	27
D.	CHECKLIST ITEM 2 (UNEs) and CHECKLIST ITEM 4 (Local Loops): The Commission Should Review Verizon's "No Facilities" Policy for High Capacity Loops Because it Delays CLEC Entry and Thereby Restricts Competition in West Virginia.	34
E.	CHECKLIST ITEM 4 (Local Loops) and CHECKLIST ITEM 5 (Local Transport): To Cure the Serious Flaws in Verizon's Dark Fiber Practices, the Commission Should Direct Verizon to Offer CLECs Dark Fiber in West Virginia Under the Same Terms and Conditions Approved by the FCC in the Virginia Non-Price Arbitration Order.	40

F.	CHECKLIST ITEM 4 (Local Loops) AND CHECKLIST ITEM 5 (Local Transport): Inasmuch as Verizon's OSS for CLECs to Order New EELs Burdens CLECs with Unreasonable Costs and Delays, the Commission Should Require Verizon to Implement the Same Ordering Processes in West Virginia That are Already in Place in Massachusetts and Rhode Island.	43
G.	CHECKLIST ITEM 8 (Directory Listings): To Help Ensure That Verizon Provides Reasonable and Nondiscriminatory Access to Directory Listings, the Commission Should (1) Require Verizon to Undertake a Special Study of the VIS Directory Listing Database in West Virginia as was Done in Virginia, and (2) Direct That Verizon May Not Charge (or Backbill) for Directory Listings Inquiries.	45
Н.	CHECKLIST ITEM 13 (Reciprocal Compensation): Verizon Is Not In Compliance with the FCC's Intercarrier Compensation Order.	52
I.	Verizon Should Be Required to Assist the Commission's Staff to Replicate the Carrier-to-Carrier ("C2C") Metrics in West Virginia, Either Directly or With Third Party Assistance, and in Furtherance of that Endeavor – and to Allow CLECs to Replicate Metrics Results – Should Be Required to Publish the Metrics Business Rules for West Virginia.	54
J.	Verizon Should be Required to Explicitly Commit That It Will Not Challenge the Commission's Authority to Adopt, Enforce, or Modify the Performance Assurance Plan ("PAP") Pursuant to the Change Provisions of the PAP.	63
	Conclusion	68

BEFORE THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

Verizon West Virginia Inc.		
Petition in the matter of Verizon West Virginia Inc.'s compliance with conditions set forth in 47 U.S.C. § 271(C)) Case No. 02-0809-T-	·P

RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY AT&T COMMUNICATIONS OF WEST VIRGINIA, INC.

I. Introduction and Summary

The FCC's 271 Orders have watered down the checklist requirements to the point where meeting them is now the regulatory equivalent of passing a class with a D- grade. West Virginia consumers, however, deserve better than D- treatment. For years they have paid some of the highest local exchange rates in the nation, yet have been denied any alternatives because Verizon's high UNE rates, its poor treatment of its wholesale customers, and its discriminatory interconnection practices have driven many CLECs out of West Virginia and kept others away.

Circumstances need to change. The proposed findings of fact and conclusions of law set forth below identify specific preconditions Verizon should be directed to meet before this Commission will endorse a Verizon 271 application. The Commission's Order in this proceeding should specify that it will not provide a positive consultative

report to the FCC unless and until Verizon provides a commitment to the Commission, in writing, executed by an officer of the company qualified to bind the company, that:

- First and foremost, Verizon West Virginia will implement AT&T's recommended UNE rates and will not seek to increase them in any petition for reconsideration or appeal;
- Verizon will not challenge this Commission's authority to implement a Performance Assurance Plan;
- Verizon will not deny any CLEC's request to implement the same interconnection provisions established for Verizon Virginia in the FCC's Virginia Arbitration Non-Price Order and the subsequent interconnection agreement approved by the FCC (in other words, Verizon West Virginia cannot demand that any CLEC accept Verizon's "GRIP" provision if the CLEC does not want it);
- Verizon West Virginia will note on its website when there is "discounted" collocation space available at a central office, will provide quarterly updates to CLECs who have returned space, will implement a Method and Procedure to prioritize re-assignment of CLEC returned space and streamline the crediting process, and will use a 30 year amortization period to calculate credits due to a vacating CLEC and the "discounted" price to a subsequent CLEC.
- Verizon will not oppose Commission action to monitor and review Verizon's "no build" policy for UNEs, to examine whether Verizon's UNE and special access pricing should be unified, and to examine whether Verizon should be required to adhere to metrics and a Performance Assurance Plan for its provision of special access services;
- Verizon will not deny any CLEC's request to implement the same dark fiber provisions established for Verizon Virginia in the FCC's Virginia Arbitration Non-Price Order and the interconnection agreement approved by the FCC (in other words, Verizon West Virginia cannot demand that any CLEC accept alternate dark fiber terms and conditions if the CLEC does not want them);
- Verizon will permit CLECs to order Enhanced Extended Loops (EELs) in a coordinated manner that ensures billing for both the loop and transport portions will not begin until the EEL is provisioned and operational, even if the loop and transport portions operate at different speeds;
- Verizon will not oppose the establishment of a Commission review of its directory listings processes, and will not charge CLECs for Directory Listing Inquiries, and

• Verizon will assist staff in replicating Carrier-to-Carrier ("C2C") Metrics in West Virginia, either directly or with third party assistance, and will publish the Metrics Business Rules for West Virginia.

II. West Virginia has Less Local Exchange Competition Than any State Where Verizon has Obtained § 271 Approval.

Recommended Findings of Fact

- 1. Competition results in lower prices, more efficient deployment of resources, and improved customer service. Congress enacted the Telecommunications Act of 1996 in an effort to bring these benefits of competition to local exchange telephone service, a service that has essentially been provided on a monopoly basis for over a century.
- 2. While a number of states are beginning to see increasing levels of local telephone competition, West Virginia is not among them. CLECs have only a 4.2% market share in West Virginia, the lowest of any state where Verizon has applied for 271 authority. FCC statistics barely reflect any CLEC presence, and show that 99% of West Virginia's zip codes do not have even a single CLEC present.
- 3. While Verizon West Virginia disputes the accuracy of the FCC's data (but concedes it has done nothing to challenge them),³ Verizon's own data proves that competition is not very extensive in West Virginia.
- 4. Verizon possesses information about its competitors' activities because in many if not most instances its competitors rely on Verizon, in whole or in part, for network components the competitors use to provide their services. That is neither surprising nor unusual. Twenty years ago when MCI, Sprint and others began competing with AT&T in

3

Joint Exh. 1, Fifth Interim Workshop Report at 7-8.

AT&T Exh. 6, at Table 14.

the long distance market, the new interexchange carriers leased capacity from AT&T while they constructed their own nationwide long distance markets. Today, in states where Verizon has already obtained authority to provide long distance service, Verizon Long Distance is doing the same thing, leasing capacity from existing interexchange carriers to provide its own services.

- 5. The Telecommunications Act mandates the same practices in the local market. Under the Act, Verizon must "unbundle" its network and make the various piece-parts available for CLECs to use in providing their own services.⁴ Congress intended for this "unbundling" requirement, together with a companion requirement that Verizon allow CLECs to engage in the resale of Verizon's retail services, to give CLECs some of the raw materials they would need to enter the local exchange market.
- 6. One method of CLEC entry is through use of the "Unbundled Network Element Platform" (termed "UNE-P") where the CLEC uses the piece parts of Verizon's network to provide its service. Although nationwide, CLECs are serving nearly 11 million customers on a UNE-P basis⁵ (a number which even Verizon projects will continue growing at a rapid pace⁶), almost none of those customers are West Virginians. Verizon's own data show that Verizon West Virginia is furnishing CLECs with fewer

³ Tr at III-169.

⁴⁷ U.S.C. § 251(c) "Each incumbent local exchange carrier has the following duties . . . (c) The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory. . . "

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98 and 98-147, letter to FCC Commissioners from AT&T General Counsel James Cicconi, November 13, 2002, at 2.

⁶ AT&T Exh. 11, at p. 5.

than 1700 UNE-P arrangements. In West Virginia, the number of UNE-P arrangements actually shrank 40% between March and June, 2002.⁷

- 7. A CLEC also may enter the local market as a "facilities based" carrier where the CLEC uses at least some of its own facilities to provide services to its customers. FiberNet, the largest CLEC in the state, is considered a "facilities based" carrier because it uses its own switching facilities to serve its customers. But the evidence also indicates that in most circumstances FiberNet uses Verizon unbundled loop facilities to establish the necessary connection between its switch and its customer locations. Verizon's data indicates that it has not provided a large number of unbundled loops to FiberNet and other CLECs, and that those few are highly concentrated in just a few of Verizon's wire centers in the larger cities.⁸
- 8. The third potential method of CLEC entry is through resale of Verizon's retail services. Under this approach, CLECs may obtain Verizon's retail services at a wholesale discount. Here again, Verizon's own data shows that the number of resale arrangements it provides to CLECs is declining, both in West Virginia and elsewhere in the Verizon footprint.⁹
- 9. Summing the number of UNE-P arrangements, unbundled loops and resale arrangements drawn from Verizon's own data indicates that CLECs are serving fewer

AT&T Exh. 9P. Between March and June, the number of UNE-P arrangements Verizon had provided to CLECs shrank from 2,774 to 1,645.

AT&T Exh. 12P. The data show that 16% of the wire centers contain nearly 100% of the UNE loops Verizon has provisioned. Conversely, the data show that Verizon has not provisioned a single unbundled loop from 79% of its wire centers.

AT&T Exhs. 8P, 11. The data also show that 52% of the customers being served through resale are concentrated in just 13% of Verizon's wire centers, which proves that competition is not extending to the more rural parts of the State.

than 38,000 access lines. Verizon, on the other hand, serves approximately 842,000 access lines. Thus, as a matter of simple math, CLECs have a 4% market share.

- 10. Virtually all of the access lines served by CLECs are being provided to business customers. CLECs in West Virginia presently serve virtually no residential customers.¹¹
- 11. Verizon argues that these numbers understate CLEC presence in West Virginia because other CLECs may be serving customers entirely over their own facilities. As proof, Verizon argues that CLECs have more than 38,000 listings in the E911 database. The evidence, however, indicates that Verizon's estimates of CLEC presence are, at best, a guess. For one thing, Verizon's own data show that it has far more E911 listings than it has access lines in service. He are used to accept Verizon's estimate of CLEC market share as accurate, it would not matter. The data would still show that the CLEC market share in West Virginia is lower than in any state where Verizon has applied to the FCC for long distance authority.

Recommended Conclusions of Law

1. Although Section 251(d)(2)(B) of the Telecommunications Act invites each state commission to consult with the FCC on whether the Regional Bell Operating Company in that state has met the requirements of the Act's "14 point checklist" of market-opening requirements, nothing in the federal Act precludes a state commission from conducting any additional inquiry it deems necessary to

Verizon Exh. 1A, Declaration of Gale Given, at ¶ 8.

¹¹ Id. at ¶ 9.

Verizon Response to AT&T in-hearing data request 2.

¹³ Tr. at III-181-185.

Verizon response to AT&T Post Hearing Exhibit 10P.

determine whether local exchange competition is developing in a manner the state commission deems appropriate and in the public interest for that state.

- 2. and independent authority has This Commission broad West Virginia law to "investigate all rates, methods and practices of public utilities" subject to the Commission's jurisdiction. West Virginia Code § 24-2-2. From the time of the Commission's creation, the Legislature has conferred upon the Commission "almost unlimited power of control" over public utilities to ensure that their operation serves the public interest. United Fuel Gas v. PSC, 103 W.Va. 306; 138 S.E. 388 (1927). Thus, whatever the FCC's expectations of this Commission under the federal Telecommunications Act, this Commission has an independent obligation, under West Virginia law, to ensure that local exchange competition is developing in all parts of West Virginia in ways that meet the needs of West Virginia consumers.
- 3. Where this Commission determines that additional actions are required to open West Virginia's local exchange markets to competition, this Commission has clear authority under state law to direct Verizon to undertake those actions.

Joint Exhibit 1; Fifth Interim Workshop Report, p. 8.

- III. This Commission Should Not Endorse Verizon's § 271 Application to the FCC Unless and Until Verizon Fully Complies With All Checklist Item Conditions.
 - A. CHECKLIST ITEM 2 (UNE Pricing): The Establishment of UNE Rates That Will Facilitate Competition Is the Most Critical Telecommunications Issue Facing the Commission.

Recommended Findings of Fact

- 1. The reason that CLECs have not been able to enter West Virginia in substantial numbers is no great mystery. As in many regulatory proceedings, it boils down to an issue of price. The Telecommunications Act of 1996, and subsequent FCC rules and court decisions, require that the rates for unbundled network elements be established according to "TELRIC" principles, meaning that rates must be based on Total Element Long Run Incremental Costs. Shortly after the passage of the Act, state regulators across the nation, including this Commission, endeavored to establish UNE rates that complied with the Act and the FCC's rules. This Commission established what it believed were TELRIC-compliant rates in 1997 in Case No. 96-1516-T-PC, et. al. 16
- 2. The initial UNE prices established by state regulators, including the ones set by this Commission, did not result in an avalanche of local exchange competition, or anything close to it. In the past few months, however, a number of state regulators, most recently New Jersey in the Verizon footprint,¹⁷ have revisited their initial UNE pricing decisions. In many instances commissions have found that UNE costs have fallen and, accordingly, have reduced UNE rates for the incumbent Bell Operating Company. In

¹⁶ Case No. 96-1516-T-PC, et al, Order dated May 16, 1997.

New Jersey Board of Public Utilities, Docket No. TO00060356, *In the Matter of the Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic – New Jersey, Inc.*, Decision and Order, March 6, 2002; Order on Reconsideration, September 13, 2002.

those states, CLECs are entering the market and offering competitive local exchange services to both business and residential consumers. In New York, for example, the Public Service Commission reduced Verizon's UNE rates effective January, 2002, and CLECs now serve more than 2 million UNE-P customers, including a number of residential customers. Earlier this year, the New Jersey Board of Public Utilities reduced Verizon New Jersey's UNE rates by approximately 40% and, shortly thereafter, AT&T announced that it would be offering service to consumers throughout that state. Nationwide, data reported to the FCC shows that by year end CLECs will be serving almost 11 million residential and small businesses using UNE-P arrangements. West Virginians, however, will not be included in that count.

3. Checklist item 2 requires that Verizon provide unbundled network elements at TELRIC-compliant rates. Verizon West Virginia's existing rates do not meet that standard. Indeed, the clear evidence is that Verizon West Virginia cannot obtain § 271 approval from the FCC unless its existing UNE rates are reduced from existing levels because the existing rates will not pass the FCC's threshold test.²² In reviewing any Verizon 271 application, the FCC conducts what it terms its "New York benchmark test"

New York Public Service Commission Case No. 98-C-1357, Order issued and effective January 28, 2002.

New Jersey Board of Public Utilities, Docket No. TO00060356, *In the Matter of the Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic – New Jersey, Inc.*, Decision and Order, March 6, 2002; Order on Reconsideration, September 13, 2002.

July 15, 2002, "AT&T To Offer Residential Local Service in New Jersey Later This Summer." AT&T Press Release available at www.att.com.

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98 and 98-147, letter to FCC Commissioners from AT&T General Counsel James Cicconi, November 13, 2002, at 2.

²² Tr. at III-202, 3.

to determine whether the Verizon UNE rates fall within a zone of reasonableness.²³ The FCC readily admits that in applying its test it is not trying to determine whether a state's UNE rates are "right." It readily acknowledges that "different states may reach different results that are each within the range of what a reasonable application of TELRIC principles would produce."²⁴ It also concedes that rates which pass its benchmark test are not necessarily TELRIC compliant, in that "even if a [state commission] failed to apply the proper TELRIC methodology in every respect, the fact that [the Bell Operating Company's UNE rates pass a benchmark comparison to rates that are TELRICcompliant provides a basis for [an FCC] finding that, despite these alleged errors, [the Bell Operating Company's rates fall within the range that a reasonable application of TELRIC principles would produce."²⁵ In short, the FCC applies its benchmark test only to see if UNE rates fall under the top of its range of reasonableness. It is not making any judgments about where those rates fall within the range, nor is it making any judgments about whether those rates are adequate to promote the development of meaningful competition, especially in residential or rural markets. Those more difficult judgment calls are left entirely to the state commissions.

4. But even though the FCC's benchmark standards are not rigorous ones, the evidence shows that Verizon West Virginia's existing UNE rates will not pass them.

The FCC's benchmark test applies relative cost differences from its Synthesis Model to compare UNE rates for the "applicant" state to those in effect in a state where the same RBOC has already obtained 271 approval. For the Verizon states, the "anchor" state is New York. *See Virginia 271 Order* at ¶¶ 91-92.

Virginia 271 Order at \P 63.

²⁵ *Id.* at ¶ 89.

Thus, as a condition of this Commission's endorsement of any Verizon 271 application to the FCC, Verizon must agree to reduce its UNE rates.²⁶

- 5. The difficult question for the Commission, however, is to determine the extent to which those rates must be reduced. In an ideal world, this Commission would open a UNE pricing proceeding, invite Verizon and interested parties to submit cost models, and hear evidence on what new UNE rates should be. As a practical matter, however, such proceedings have proven to be incredibly expensive and time consuming. No party, not even the CLECs participating in this case, are advocating that this Commission conduct such a proceeding at this time. In any event, it would not make sense to do so, given that the FCC has not yet completed its review of a broad range of UNE issues in its *Triennial Review* proceeding,²⁷ nor has the FCC released its pricing decisions in the *Virginia Arbitration Proceeding*.²⁸ Both of those decisions may be helpful to this Commission in fashioning West Virginia's future UNE policies, but until they are released an additional pricing proceeding would be premature.
- 6. Absent a pricing case, this Commission is left to reduce UNE prices based on the record before it here. Three pricing proposals have been offered one in the form of a Joint Stipulation from Commission Staff, the Consumer Advocate Division and

Verizon must also implement rates for Unbundled Network Elements identified by the FCC in its UNE Remand Order. Those rates are at issue in Case No. 01-1616-T-PC and will be decided in a separate Commission action.

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98 and 98-147.

Federal Communications Commission, CC Docket No. 00-251, In the Matter of the Petition of AT&T Communications of Virginia, Inc., pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., Memorandum Opinion and Order, released July 17, 2002 ("Virginia Arbitration Proceeding").

Verizon, one from AT&T and one from FiberNet. Of the three, the Commission finds that the best interests of West Virginia will be served by adopting the AT&T proposal.

- 7. The FiberNet proposal would reduce existing UNE rates by 40% across the board.²⁹ This is an extremely aggressive approach that would reduce UNE rates more than the Commission believes necessary or appropriate.
- 8. The Staff/Consumer Advocate/Verizon proposal, on the other hand, would not reduce UNE rates enough to stimulate the development of competition.³⁰ With regard to loop prices, the evidence shows that rates for unbundled loops in the existing Zone 1 exchanges would not be changed at all. Zone 1 includes Charleston, Huntington and most of West Virginia's larger cities. Today nearly 80% of the loops being provided to CLECs are located in Zone 1, and as competition develops in the future it is likely that a large portion of unbundled loops will continue to be provisioned in Zone 1. Thus, under the Staff/Consumer Advocate/Verizon proposal the rates for unbundled loops are not being reduced at all for the portions of the state where competition is most likely to develop.
- 9. The Staff/Consumer Advocate/Verizon proposal purports to reduce loop rates by 17% on a statewide average basis, but the reductions they propose are more a function of mathematics than of practical benefit to CLECs. Instead of reducing rates in areas where competitors have expressed an interest in providing services, the Staff, Consumer Advocate and Verizon propose simply adding more exchanges to Zone 1 and rearranging the prices and exchanges for the other Zones so that, overall, the weighted

FiberNet Exh. 3, Direct Testimony of Virgil E. Parsons, at 13-15.

Verizon Exh. 12, Joint Stipulation of Verizon, Staff and the Consumer Advocate Division.

average rate would fall by 17%.³¹ Here again, though, their proposal does nothing to reduce rates for the vast majority of unbundled loops the CLECs have purchased to date and that they are likely to purchase anytime soon.

- 10. The Commission also rejects the Staff/Consumer Advocate/Verizon proposal for two additional reasons. First, the evidence is compelling that Verizon would never agree to a UNE pricing proposal that it believed would actually promote the development of competition.³² The Commission is aware that Verizon CEO Ivan Seidenberg calls UNE-P a "destructive policy" endorsed only by state commissions who, in his view, "don't get it" and "don't have a clue. . . ."³³ Given his strong views on this topic, it is unlikely that Mr. Seidenberg would ever agree for Verizon West Virginia to enter into a voluntary settlement that actually promotes UNE-P competition.
- Advocate/Verizon Stipulation would preclude Staff and the Consumer Advocate from offering any recommendations to the Commission regarding UNE pricing until 2006.³⁴ While the Commission generally encourages Staff and the Consumer Advocate to resolve matters through stipulated agreements, in this instance the agreement is not in the best interests of West Virginia consumers. Events are unfolding rapidly in the telecommunications industry, and the Commission will not tie the hands of its Staff and

Verizon Exh. 12 at \P 1.

AT&T Exh. 3, Declaration of Robert J. Kirchberger and E. Christopher Nurse, at 10-15.

AT&T Exh. 3, Declaration of Robert J. Kirchberger and E. Christopher Nurse, at ¶ 11, citing September 10, 2002, *Communications Daily* at p. 4, "Seidenberg says UNE-P is 'Manageable Issue' for Verizon."

Verizon Exh. 12, Joint Stipulation of Verizon, Staff and Consumer Advocate Division, at $\P\P$ 3, 5.

the Consumer Advocate for three years in ways that preclude them from voicing future concerns regarding UNE prices.

12. The AT&T proposal for reducing loop rates will require Verizon to reduce its weighted average loop rates by the same 17% being proposed by Staff, the Consumer Advocate and Verizon, but will accomplish that reduction in a manner that actually promotes the development of competition. Under the AT&T proposal the Commission adopts here, the existing three Density Zones will be maintained and rates in each zone will be reduced by approximately the same dollar amount:³⁵

AT&T PROPOSED LOOP RATES				
	% of lines	Existing rate	AT&T Proposed	Reduction
			Rate	
Zone 1	39%	\$14.49	\$10.00	\$4.49
Zone 2	34%	\$22.04	\$17.50	\$4.54
Zone 3	27%	\$43.44	\$39.50	\$3.94
Statewide	100%	\$24.58	\$20.52	\$4.06
Average				

The Commission finds that these rates both will satisfy the FCC for § 271 purposes and will satisfy this Commission's goals for promoting the development of competition within West Virginia. Thus, as a condition of this Commission's endorsement of Verizon's 271 application to the FCC, Verizon must affirm, in writing, that it will implement these revised loop rates and will not appeal them or seek to have them modified on reconsideration.

13. The Commission also adopts AT&T's proposal that Verizon West Virginia implement in West Virginia the same switch usage rates implemented for

14

 $^{^{35}}$ AT&T Exh. 3, Declaration of Robert J. Kirchberger and E. Christopher Nurse at \P 52, p. 18.

Verizon New Jersey.³⁶ As AT&T observed,³⁷ and as Verizon witness Given could not dispute,³⁸ Verizon's costs of switching do not vary in any material way from state to state. Indeed, one of the arguments presented in favor of the two mergers that created Verizon – first the merger of Bell Atlantic and NYNEX, then of Bell Atlantic and GTE -- was that the mergers will enhance the efficiency of the organization, such as giving the enterprise increased purchasing power to negotiate favorable prices for equipment, including switching equipment.³⁹ This Commission sees no reason why Verizon West Virginia should charge switch usage rates any higher than those recently approved for its sister company in New Jersey, especially since those rates were adopted after an exhaustive New Jersey BPU investigation of Verizon's switching costs. Thus, as with loop rates, before this Commission will endorse Verizon's 271 application to the FCC, Verizon must affirm, in writing, that it will implement these revised switch usage rates and will not appeal them or seek to have them increased on reconsideration.

14. The Commission rejects both the FiberNet and Staff/Consumer Advocate/Verizon switch rate proposals. The FiberNet proposal can be rejected out of hand for two reasons. First, FiberNet does not purchase switching from Verizon and so has no real interest in the level of the rate.⁴⁰ Second, the 40% reductions it proposes are insufficient to pass the FCC's New York benchmark test. It would make no sense for this Commission to implement rates that no party, including Verizon, believes are low enough

³⁶ Id. at ¶ 53.

³⁷ Id.

³⁸ Tr. at 217.

AT&T Exh. 3, Kirchberger/Nurse, at ¶ 35.

⁴⁰ Tr. at 280-281.

to meet the FCC's benchmark test. With regard to the Staff/Consumer Advocate/Verizon proposal, the reduction proposed is also inadequate. The evidence shows that the proposed rates are intended to reduce Verizon's switching rates to a level that just meets the FCC's benchmark test.⁴¹ But as noted above, the FCC itself acknowledges that those rates are merely the top of the zone of reasonableness. Such rates may be sufficiently low to pass the FCC's non-rigorous § 271 test, but still too high to promote competition. In the Commission's view, the rates this Commission approves must be set low enough within the "zone of reasonableness" to be useful to CLECs. The rates AT&T proposes satisfy that goal.

The one other rate directly at issue in this proceeding is Verizon's non-recurring charge for a UNE-P "migration." A migration occurs when an existing Verizon customer elects to become a CLEC UNE-P customer at the same location, such that no physical changes are required in the customer's service configuration. In this circumstance, the necessary change occurs electronically. The evidence indicates that the systems Verizon uses to process these transactions are operated on a centralized basis across a multi-state region, 43 so, again, there is no reason why Verizon West Virginia's charge for a UNE-P migration should exceed the rate established for its sister company in New Jersey. As with loop and switching rates, before this Commission will endorse Verizon's 271 application to the FCC, Verizon must affirm, in writing, that it will implement the reduced UNE-P migration charge and will not appeal or seek to have the rates increased on reconsideration.

41 AT&T Exh. 3, Kirchberger/Nurse, at ¶¶ 37-38.

⁴² Id. at ¶ 43.

⁴³ Id. at ¶ 45

- 16. As a general matter, the Commission finds that the reductions it is requiring in Verizon's loop, switch usage and non-recurring UNE-P migration rates will promote the development of local exchange competition in West Virginia. Conversely, the evidence indicates that absent these reductions, CLECs like AT&T will not be able to enter the West Virginia local exchange market, an outcome that would not be in the best interests of West Virginia consumers. The Commission wants local exchange competition to develop broadly, in all parts of the State, and finds that the UNE reductions being required of Verizon here are a necessary step towards that goal.
- 17. Increasing the level of local exchange competition in West Virginia necessarily means that Verizon's customers and revenues will be put at risk. But that is exactly as it should be in a competitive market. In a fully competitive market, the carrier that best meets consumer needs will be the one that wins the business. But at the same time Verizon will be facing additional risks in the local exchange market, it will also be enjoying additional revenue opportunities in the long distance market, assuming it obtains § 271 authority from the FCC. Those additional revenue opportunities are substantial, and Verizon's high-profile presence and outstanding reputation in West Virginia should give Verizon West Virginia the same level of success in long distance that its sister companies already enjoy. 44 From this Commission's reading of the Telecommunications Act, this balance of interests is exactly what Congress intended specifically, that Verizon and the other Bell Operating Companies can begin providing long distance service once they take adequate steps to open their local markets to competition.

-

AT&T Exh. 11 at 9 (showing that Verizon Long Distance experienced a 51% growth in its subscribership in the second quarter of 2002 compared to the second quarter, 2001. At the end of the second quarter, 2002, Verizon Long Distance had 9.0 million customers).

- 18. Near the end of the hearing, Verizon introduced evidence on rebuttal arguing that the UNE rates being recommended in the Staff/Consumer Advocate/Verizon Stipulation provide adequate "headroom" to make entry attractive to CLECs. The Commission does not find Verizon's evidence persuasive. For one thing, testimony from an actual potential CLEC suggests otherwise. AT&T's testimony is that AT&T will not enter the West Virginia residential market at the rates Staff, Consumer Advocate and Verizon recommend. AT&T did not equivocate on this point, so the Commission accepts as fact that AT&T meant what it said and was not, as a Staff witness suggested, simply engaging in some sort of negotiation "scare tactic."45
- 19. Beyond that, the Commission does not find the Verizon data credible. The bulk of Verizon's presentation focused on a comparison of the price of Verizon West Virginia single line <u>business</u> service to the purported cost of the UNE-Platform under the Staff/Consumer Advocate/Verizon proposal. But any analysis of whether UNE rates are adequate to promote <u>business</u> competition in West Virginia largely misses the point. This Commission's focus on UNE pricing is aimed at determining whether competition can occur in the <u>residential</u> market. The Commission is well aware that Verizon's business rates far exceed its residential rates, so that a CLEC wanting to serve business customers on a UNE-P basis should be able to do so profitably. Indeed, that is not a point the CLECs dispute, so Verizon's "evidence" in this regard is hardly news.⁴⁶
- 20. That being said, the Commission is also aware that West Virginia has the lowest percentage of business lines of any state where Verizon is the incumbent RBOC.

⁴⁵ Tr. III-356

⁴⁶ Tr. III-310, 319.

Most of the business lines that do exist in West Virginia are not "UNE-P eligible" because they are provided to large customers served either via Centrex-type services or through PBX systems. Indeed, if one assumes that the most likely businesses to subscribe to a CLEC's UNE-P service are single line businesses, then the pool of potential customers is small and getting smaller. According to statistics Verizon files with the FCC, at the same time its Total Billable Access Lines were growing over 16% from 1994 to 2001 (711,660 lines in 1994 to 825,666 in 2001), the number of lines provided to single line businesses shrank by more than 17% (from 22,443 in 1994 to 17,764 in 2001). In 2001, single line businesses, the ones depicted by Verizon's hearing room chart, comprised just 2% of its total customer base. This Commission seriously doubts whether the aggregate margins available from this small base of customers would be adequate for a CLEC to cover its systems costs, marketing costs, and customer service costs.

21. Rather, any CLEC seeking to enter West Virginia on a UNE-P basis will only do so if it can offer service to the residential subscribers that comprise more than 75% of Verizon's access lines in service.⁴⁸ The evidence before the Commission shows that at the UNE rates proposed in the Verizon/Staff/Consumer Advocate Joint Stipulation, the margins available to CLECs would be too small to allow for profitable CLEC entry, which undoubtedly explains why Verizon presented its <u>business</u> comparisons on a poster-sized chart but hid the <u>residential</u> comparison on three tiny charts at the very back of its exhibit.

-

From Verizon West Virginia ARMIS 43-01 reports to the FCC, available at http://www.fcc.gov/wcb/armis/db/

⁴⁸ *Id.* Calculation based on access lines reported for 2001.

- 22. Even in Density Cell 1, where UNE-P costs are lowest and entry most likely, the margins available to CLECs under the Verizon/Staff/CAD proposal are inadequate to bring competition to West Virginia. As AT&T witness Nurse explained, the \$9.49 in "headroom" that Verizon claims is available to CLECs is overstated, for a number of reasons. One is that the analysis does not reflect any of the CLEC's costs of local transport (which even Verizon witness Given had to concede⁴⁹), nor does it reflect any amortization of the nonrecurring charges a CLEC would have to pay to establish the UNE-P account. Beyond that, Mr. Nurse noted that Verizon's analysis reflected switching costs based on only 1000 minutes of use, when actual average minutes in West Virginia average 2400 per line. The additional 1400 minutes would increase switching costs by \$3.57 in the Verizon analysis.⁵⁰ Mr. Nurse also explained that any CLEC hoping to win customers would have to offer a discount from Verizon's existing rates, and that the discount would reduce the "headroom" in Verizon's analysis.⁵¹
- 23. Thus, based on Mr. Nurse's analysis, the Commission concludes that CLECs would not be able to enter the market on a UNE-P basis in West Virginia at the UNE rates proposed by Verizon, Staff and the Consumer Advocate, not even in Density Cell 1 where UNE costs are the lowest:

⁴⁹ Tr. at III-222-223.

⁵⁰ Tr. III-315.

⁵¹ Tr. III-316.

DENSITY CELL 1 RESIDENTIAL	
"HEADROOM" ANALYSIS	\$
Density Cell 1 Residential "Headroom" from	9.49
Verizon Exh. 14	
Less CLEC's own retail costs (estimated at 20% of	5.62
Verizon retail rates; Tr. III-312-314)	
Less CLEC discount (estimated here at 10% of	2.81
Verizon retail rate) (Tr. III-316)	
Less additional switch usage costs (Tr. III-315)	3.57
CLEC "margin" based on identified costs	(2.51)
	,
Other costs identified but not quantified on the re-	cord
Less costs of Daily Usage File (Tr. III-315)	
Less costs of Local Transport (Tr. III-316)	
Less amortized non-recurring OSS costs (Tr. III-	
315)	
Actual CLEC Density Cell 1 "headroom"	None

Thus, the evidence shows that the UNE rates proposed by Verizon, Staff, and the Consumer Advocate do not provide any prospect for CLECs to serve residential customers, not even in Density Cell 1 where the UNE costs are lowest.

Verizon argues that its comparisons prove that CLECs can enter West Virginia because CLECs have entered in New Jersey where, according to Verizon's numbers, the available "headroom" is smaller than in West Virginia.⁵² But the Commission finds that comparing West Virginia to New Jersey is comparing apples to oranges. For one thing, Verizon West Virginia's calling areas are very large and the percustomer number of intraLATA toll calls is very small. In contrast, Verizon New Jersey calling areas are quite small and the per-customer number of intraLATA toll calls is very large. Any CLEC looking to enter New Jersey would factor into its calculus the revenues it could expect to receive from those intraLATA toll calls. Those revenues would give a New Jersey CLEC substantially more "headroom" than Verizon's Exhibit 14 indicates.

25. The Commission wants to emphasize one additional point regarding the UNE rates it will require Verizon to implement as a condition for gaining this Commission's endorsement of its § 271 application to the FCC. The point is simply this - the UNE rates being established here are no more permanent than any other rates set by the Commission. If Verizon believes in the future that these rates are unjustly and unreasonably low, it may ask the Commission to increase them, just as any CLEC believing the rates are too high can seek a reduction. In accordance with this Commission's practices, any proposal to change UNE rates must be accompanied by cost support. In the case of Verizon, any proposal to increase UNE rates must also include, in addition to cost support, information showing the number of long distance customers Verizon West Virginia is serving, the revenues it receives from those customers, and the growth in both long distance customers and revenues over time. In addition, Verizon also would need to provide information showing trends over time in the number of UNEloops, UNE-Platforms and resale arrangements it has provided to CLECs, together with any other information Verizon deems relevant regarding inroads it believes CLEC competitors have made into Verizon's West Virginia service territory. Finally, any such Verizon request must also include information regarding Verizon's financial performance in West Virginia, not only from Verizon West Virginia, but also from all other Verizon affiliates that do business in West Virginia, including, but not limited to, Verizon's long distance affiliate and its directory advertising affiliate. Merely because this Commission does not regulate the prices charged by a Verizon affiliate or otherwise oversee its operations in the State does not mean this Commission cannot review information which

⁵² Verizon Exh. 14.

might be helpful in assessing Verizon West Virginia's wholesale rates. Finally, the Commission would caution Verizon that it will not tolerate any Verizon proposals to increase UNE rates purely for the purpose of thwarting the further development of competition.

Recommended Conclusions of Law

- 1. The UNE rates recommended by Verizon, the Staff and the Consumer Advocate are unjust and unreasonable in that they are too high to facilitate the development of competition in West Virginia.
- 2. The UNE rates recommended by AT&T are just and reasonable and will promote the development of competition in West Virginia. The loop rate reductions AT&T recommends reduce rates by the same 17% overall that Verizon has agreed is appropriate, except that AT&T's recommendations ensure that loop rates will be reduced for all three existing density zones by approximately the same dollar amount. The switching reductions AT&T recommends match switching rates implemented earlier this year by the New Jersey BPU, and it is reasonable for this Commission to find that Verizon's switching costs in West Virginia should be no higher than in New Jersey. Likewise, given that Verizon operates its wholesale service centers on a regional basis, it is reasonable for this Commission to adopt the same UNE-P migration charge for Verizon West Virginia as the New Jersey BPU has adopted for Verizon New Jersey.

B. CHECKLIST ITEM 1 (Collocation): Verizon Should be Required to Improve Its Processes for Issuing Credits to CLECs for the Return of Collocation Space and for Offering Reduced Collocation Prices to CLECs Willing to Utilize Returned Space.

Recommended Findings of Fact

- 1. Checklist Item 1 requires that Verizon offer interconnection including interconnection through collocation on rates, terms and conditions that are just, reasonable and non-discriminatory. The evidence in this proceeding demonstrates that Verizon's processes for crediting CLECs for returning collocation space is wholly inadequate. Moreover, Verizon does not take reasonable steps to promote the use of the returned space (which is available at a discounted rate) to collocators seeking new space.
- 2. Over the course of the last two years, poor market conditions have forced CLECs to return an increasing number of collocation arrangements to Verizon. Of the 79 collocation arrangements provisioned by Verizon West Virginia through July 2002, CLECs have returned 35 arrangements. AT&T Exh. 1A (Kirchberger/Nurse), Attachment 2; Verizon Exh. 8B at ¶ 35.
- 3. Under both the federal and intrastate collocation tariffs, the vacating CLEC is entitled to a credit for the unamortized portion⁵³ of the non-recurring space and facilities conditioning charge when the collocation space is reused either by another CLEC or Verizon itself. AT&T Exh. 1A at 32. Given that the CLECs pay a non-recurring Space and Facilities Charge of approximately \$47,000 under the FCC tariff and approximately

24

The amortization period is critical to the calculation of the credit for a CLEC returning collocation space. The greater the amortization period, the lower the credit for returned space to the vacating CLEC.

\$32,000 under the state tariff for 100 square feet of collocation space, the potential refund for returned collocation space is substantial. *Id.* Verizon Exh. 8B at ¶ 32.

- 4. Despite the high percentage of arrangements returned to Verizon by CLECs and the associated potential refunds for the returned space and despite the obvious efficiencies that could be gained from encouraging CLECs to re-use existing collocation space rather than build new, the evidence in the record suggests that Verizon has disregarded its responsibilities to its wholesale customers. Of the 35 returned collocation arrangements, Verizon has not provided a credit to any vacating collocator. AT&T Exh. 1A, Attachment 3.
- 5. Verizon would put the burden is on the CLEC to find new collocators to take the old collocator's space. Verizon asserts that it is not under any statutory requirement to actively advertise the availability of returned space. Verizon even suggests that the vacating collocator itself should take various steps to make other potential collocators aware of the vacated space. Verizon Exh. 8B at 13-15.
- 6. Verizon's view is simply not reasonable. Verizon, as the commercial "landlord" of the central office, is the entity with the direct interaction with CLECs interested in collocation and, thus, should be responsible for managing its space including the reuse of the space.
- 7. Not only can vacating CLECs benefit from a streamlined process for the return of collocation space, in-coming CLECs can also benefit from the discounts available on the returned space. For example, if a collocator paid \$47,000 and returned the space after 50% amortization, a new collocator seeking the same space would be able to purchase it for a \$23,000 non-recurring charge. This is a substantial discount that can

only serve to encourage the entry of competitors through collocation. AT&T Exh. 1A at 35-36.

- 8. It goes without saying that Verizon has no incentive to expedite the refund process for vacating collocators or to more aggressively pursue new potential collocators. The CLEC has already paid Verizon for the space through the non-recurring Space and Facilities Charge. If Verizon can slow the re-use of returned space, then it can make it more difficult for CLECs to both enter and exit the local market. The vacating collocator has to wait for its refund, and the new collocator may not even be aware that discounted space is available. AT&T Exh. 1A at 33-34.
- 9. In order to resolve these problems, the Commission, before it will endorse Verizon's § 271 application, will require Verizon to modify its collocation policies and practices by: (1) placing a notation on its website indicating that returned discounted space was available at a specific central office; (2) providing quarterly status report to those CLECs who have returned space; (3) developing methods and procedures to prioritize the re-assignment of space; and (4) using a 30 year amortization period to calculate credits to a vacating CLEC. AT&T Exh. 1A at 34-36. Verizon offered no reasonable explanation for its failure to provide collocation pursuant to these simple practices and procedures.

Recommended Conclusions of Law

1. Verizon has failed to meet Checklist Item 1 with respect to Collocation as a direct result of its practices and policies related to the return of collocation space to Verizon.

- 2. Before this Commission will endorse Verizon's § 271 application, Verizon must confirm to the Commission, in writing, that it has taken the following corrective actions:
 - Verizon is indicating on its website where there is "discounted" collocation space available at each applicable central office.
 - Verizon is providing quarterly status reports to CLECs who have returned space.
 - Verizon will develop a Method and Procedure that prioritizes the reassignment of CLEC returned space and otherwise streamlines the return and crediting process.
 - Verizon will use a 30 year amortization period to calculate the credits due to a vacating CLEC as well as the "discounted" price to a subsequent CLEC.

Only after Verizon affirms, in writing, that it has met each of these conditions will this Commission be able to conclude that Verizon has met the Checklist Item 1 requirements with respect to collocation.

C. CHECKLIST ITEM 1 (Interconnection): Verizon Should Be Required to Offer All CLECs in West Virginia the Point Of Interconnection ("POI") Provisions and Language that the FCC Required Verizon to Implement in the AT&T/Verizon Virginia Interconnection Agreement Arbitration.

Recommended Findings of Fact

1. Despite the FCC's rejection of its "geographically relevant interconnection point" ("GRIP") position in the Virginia arbitration between AT&T and Verizon VA, Verizon continues to make unlawful interconnection demands on CLECs, demands that increase CLEC costs and thereby reduce the ability of CLECs to offer competitively priced local exchange services, or worse yet, discourage CLEC entry in the local exchange markets in West Virginia.

- 2. Verizon's continued insistence on GRIP is evidenced by the language in its Model Interconnection Agreement, which retains the essence of the GRIP position albeit without the GRIP nomenclature.
- 3. Under Verizon's GRIP policy, as reflected in its recently amended Model Interconnection Agreement, Verizon is requiring CLECs to interconnect at either a Verizon tandem or end office switch serving the Verizon called party. Under its policy, Verizon seeks to determine the POI, contrary to the provisions of the Act and the FCC Rules that place that decision in the hands of CLECs, and in effect shift some of the costs of terminating Verizon's traffic to the CLECs. Granting Verizon the ability to impose POIs on CLECs would give it the power to directly –and anti-competitively affect the CLECs' costs.
- 4. Rather than adhering to the law as the FCC mandated in the *Virginia Arbitration Order*, ⁵⁴ Verizon forces CLECs to expend bargaining chips solely to gain Verizon's adherence to the law, or forces the interconnection agreement into arbitration, which has adverse implications for the few remaining CLECs, many of which lack the resources to go through a resource-intensive, drawn-out arbitration process.
- 5. The selection of a POI affects the CLECs' costs. For example, a CLEC that is required to deliver its traffic to a POI at Verizon's tandem will pay both transport and termination costs to Verizon to compensate Verizon for taking the traffic from the tandem to the end office and ultimately to the called party. The CLEC's origination costs in that circumstance are the costs associated with getting traffic to the Verizon tandem, plus its reciprocal compensation costs for transport and termination.

28

Memorandum Opinion and Order, CC Dockets Nos. 00-218, 00-249 and 00-251 (released July 17, 2002) ("Virginia Arbitration Order").

- 6. If, on the other hand, the CLEC terminates its traffic at Verizon's end office, its origination costs will be the costs to get its traffic to the end office, while its reciprocal compensation costs will be the termination portion of reciprocal compensation (the cost from the end office to the called party). Thus, selection of the POI has a marked impact on a CLEC's costs of transport and termination.⁵⁵
- 7. The essence of Verizon's GRIP scheme is a fiction that has no basis in the Telecommunications Act or FCC rules. Verizon fabricated a distinction between a POI and what it has termed an "interconnection point" ("IP"). Verizon then treats the POI as the location where the parties' facilities *physically* interconnect, but uses its own creation -- the "IP"-- as the location where the carriers' *financial* responsibilities begin and end, *i.e.*, where reciprocal compensation begins, or where the originating carrier delivers its traffic for termination. This false distinction between physical and financial points of interconnection is carried forward in Verizon's recently revised Model Interconnection Agreement. Indeed, Verizon testified before the Commission that it continues to draw a sharp distinction between the physical and the financial points of interconnection.⁵⁶
- 8. Verizon claims that it is in compliance with the law and the FCC's *Virginia Arbitration Order*, citing to its newly-revised October 25, 2002, Model Interconnection Agreement that purportedly reflects the rulings in the *Virginia*

29

The difference in costs to the CLEC can be quite considerable. For example, in Delaware, Cavalier raised a claim for over \$9 million growing at the rate of over \$360 thousand per month. Similarly, in the Virginia arbitration, AT&T estimated that Verizon's similar GRIP proposals would increase AT&T's local interconnection costs by between \$1,800,000 and \$3,079,000 annually.

Tr. at III-238: "Q: Do you believe that a GRIPs thing has an impact on the ability of a CLEC to choose the way and in what manner to interconnect with an ILEC? **Mr. Albert**: No. Q: Why not? **Mr. Albert**: Because the aspect that we are talking about is strictly a matter of who pays and how much. And that that doesn't dictate where the interconnection occurs nor the type of interconnection that is used."

Arbitration Order. Indeed, it claims that the Model Interconnection Agreement does not include GRIP provisions (Tr. III-239).

- 9. However, the interconnection language in the Model Interconnection Agreement is essentially indistinguishable from the provisions that the FCC found to be unacceptable in the *Virginia Arbitration Order*. Indeed, it is essentially GRIP without the GRIP moniker, as is made plain by its provisions.
- 10. Section 66.2.4 of the Model Interconnection Agreement requires a CLEC to interconnect at "each Verizon tandem in a LATA" that subtends Verizon end offices to which a CLEC sends calls for Verizon to terminate. In contrast, the FCC rules provide that interconnection can be at a single point in a LATA.
- 11. Section 66.2.5 of the Model Interconnection Agreement requires interconnection at each Verizon end office at which the volume of traffic exceeds the equivalent of one DS1 and/or 200,000 minutes of use in a single month. In contrast, the Virginia Arbitration provisions mandated by the FCC have no such mandatory end office interconnection requirement. *Virginia Arbitration Order* at ¶ 53.
- 12. Section 66.2.6 of the Model Interconnection Agreement limits the number of trunks between a CLEC POI and a Verizon tandem switch to 240 at any time, forcing establishment of trunks to Verizon end offices whenever that magic number is exceeded. Again, the Virginia Arbitration provisions mandated by the FCC have no such mandatory end office interconnection requirement. *Virginia Arbitration Order* at ¶ 53.
- 13. Section 65 of the Model Interconnection Agreement makes it clear that a technically feasible POI must be "on Verizon's network," and can never be a CLEC wire

center, switch or transport facility. In contrast, the Virginia Arbitration provisions mandated by the FCC call for interconnection at the AT&T (i.e., CLEC) switch, in the absence of agreement to the contrary. *Virginia Arbitration Order* at ¶ 53.

- 14. Verizon asserts that its Model Interconnection Agreement provisions on POI are simply an entering position for negotiating interconnection agreements, and that CLECs may agree or not agree to those provisions in their interconnection agreements. Tr. at III-239-240. This is no excuse for not adhering to the FCC's mandated interconnection agreement language, for two reasons.
- 15. First, the Verizon negotiating position forces CLECs to bargain away a provision that is unlawful, thus giving up something else in return for obtaining a POI provision consistent with the law about which there should have been no dispute to begin with.
- 16. Second, it ignores extreme differences in bargaining power, in that few, if any, of the remaining CLECs have the resources to stand toe-to-toe with Verizon in endless rounds of negotiations and arbitrations. Verizon has every incentive to force CLECs to take the interconnection agreement to arbitration under the Act. Most CLECs lack the resources to arbitrate and therefore would be forced to accept the otherwise unlawful POI provision, or bargain it away. As to arbitrated agreements, while Verizon knows that it will lose the GRIP issue in arbitration, as it did in the *Virginia Arbitration Order*, it gains by delaying the interconnection agreement, thereby frustrating competitive entry.
- 17. The issues surrounding GRIP-type provisions cannot simply be passed off as a bilateral dispute over obscure interconnection agreement language, as Verizon seeks

to position it. Rather, they go to the heart of Verizon's compliance with the explicit requirements of the Act and the FCC's regulations implementing those statutory directives. The Commission cannot find that Verizon is in compliance with its obligations under Item 1 of the Competitive Checklist so long as Verizon continues to adhere to its current policies with respect to GRIP.

Recommended Conclusions of Law

- 1. Section 251 of the Act, and the FCC directives implementing it, most recently in the *Virginia Arbitration Order*, clearly establish (1) that a CLEC has the right to designate the location(s) where its local traffic and Verizon's local traffic will be exchanged (the POI), and (2) that each carrier bears the costs of terminating its traffic on the other carrier's network, that is, Verizon bears the financial responsibility for the costs incurred by the CLECs in terminating Verizon's traffic, and the CLEC bears the financial burden for the costs incurred by Verizon in terminating the CLEC's traffic.
- 2. Nothing in the statute or regulations supports the artificial and uneven division of costs that Verizon is attempting to impose on CLECs through its GRIP scheme. The FCC ruled in the *Virginia Arbitration Order* that Verizon's GRIP and VGRIP proposals are inconsistent with existing law and must be rejected:⁵⁷

Verizon's interconnection proposals require competitive LECs to bear Verizon's costs of delivering its originating traffic to a point of interconnection beyond the Verizon-specified financial demarcation point, the IP. Specifically, under Verizon's proposed language, the competitive LEC's financial responsibility for the further transport of Verizon's traffic to the competitive LEC's point of interconnection and onto the competitive LEC's network would begin at the Verizon-designated competitive LEC IP, rather than the point of interconnection. By contrast, under the petitioners' proposals, each party would bear the cost of delivering its originating traffic to the point of interconnection designated

-

Virginia Arbitration Order at ¶ 53 (footnotes omitted).

by the competitive LEC. The petitioners' proposals, therefore, are more consistent with the Commission's rules for section 251(b)(5) traffic, which prohibit any LEC from charging any other carrier for traffic originating on that LEC's network; they are also more consistent with the right of competitive LECs to interconnect at any technically feasible point.

- 3. Neither the Act nor the FCC's rules or decisions sustain the artificial and inequitable distinction between the point of physical and financial interconnection. In fact, the Act and the FCC's decisions use the terms "interconnection point" and "point of interconnection" interchangeably.⁵⁸ And while the POI/IP language no longer appears in Verizon's Model Interconnection Agreement with the October 25, 2002 version, presumably because of the *Virginia Arbitration Order*, its essence the mandating of POIs by Verizon rather than the CLECs, and the shifting of significant portions of Verizon's originating traffic costs onto the CLECs -- is still very much a factor today, despite the *Virginia Arbitration Order*.
- 4. The FCC's definitive statement in the Virginia arbitration proceeding on the clear meaning and effect of the law and the FCC rules should put to rest any argument that Verizon WV might propound in favor of its GRIP-type schemes. The GRIP issue

See ¶¶ 172 and 209 of the Local Competition Order citing §251(c)(2) in explaining how the POI selection affects a carrier's costs of origination and termination. ¶ 172 explains that the interconnection obligation of 251(c)(2) "allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers costs of, among other things, transport and termination." ¶ 209 explains that "Section 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LECs network at any technically feasible point, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points." And 47 CFR 51.701(c) states as follows: "(c) For purposes of this subpart, transport is the transmission and any necessary tandem switching of local telecommunications traffic subject to 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carriers end office switch that directly serves the called party, or equivalent facility provided by the carrier other than an incumbent LEC."

was squarely presented and squarely decided by the FCC in the Virginia Arbitration *Order*, unlike in the case of the Pennsylvania § 271 proceeding.

- 5. Verizon cannot hide behind the FCC's Pennsylvania § 271 Order to support its position. The FCC itself distinguished its discussion of the GRIP issue in the Pennsylvania 271 case as "not determinative of the question." Virginia Arbitration Order at footnote 123.
- 6. The FCC's decision follows a long line of FCC, state commission and federal court decisions, as demonstrated by AT&T's Mr. Kirchberger and Mr. Nurse in their Checklist Declaration.⁵⁹
- 7. The Commission will not issue any favorable report to the FCC on Verizon WV's § 271 application unless Verizon WV agrees to affirmatively offer to CLECs the same interconnection agreement provisions and language on points of interconnection ("POI") that the FCC mandated in the AT&T/Verizon Virginia arbitration, for both existing and future interconnection agreements.
 - D. CHECKLIST ITEM 2 (UNEs) and CHECKLIST ITEM 4 (Local Loops): The Commission Should Review Verizon's "No Facilities" Policy for High Capacity Loops Because it Delays CLEC Entry and Thereby Restricts Competition in West Virginia.

Proposed Findings of Fact

1. Verizon adheres to an internal policy in which it will refuse to provision high capacity UNE loop orders if "construction" is required, but will provide the very same high capacity facility to its retail customers. Verizon Exh. 8B at 27. AT&T asserts that

⁵⁹ AT&T Exhibit No. 1 at ¶¶ 57-62.

Verizon's internal "no build" policy for provisioning high capacity loops⁶⁰ to CLECs constitutes unlawful discrimination. As a result, AT&T contends that Verizon cannot meet Checklist Item 2 (UNEs) and Checklist Item 4 (local loops). Finally, AT&T testified that besides rejecting Verizon's "no build" policy, the Commission should take steps to ensure that intrastate special access is priced at TELRIC and that special access metrics and penalties are developed and implemented. AT&T Exh. 1A (Kirchberger/Nurse) at 3-7.

- 2. Verizon enforces a discriminatory and anticompetitive "no facilities" policy, whereby Verizon refuses to provide unbundled access to such loops when it would require "additional construction." The "additional construction" that triggers Verizon's "no facilities" policy includes such routine or minor tasks as installing a repeater shelf in the central office, customer location, or remote terminal; providing an apparatus/doubler case; placing fiber or a multiplexer; adjusting the multiplexer to increase its capacity; placing riser cable or a buried drop wire; or placing fiber or copper cable to replace defective copper cable or provide spare capacity. Verizon Exh. 8B at 29. Verizon's "no build" policy is not based on technical impediments, but rather policy.
- 3. Verizon invokes its "no facilities" policy to reject CLEC orders for high capacity loops in West Virginia. The information developed at the Commission's workshops indicate that Verizon has rejected 60% of the FiberNet EEL DS1 orders placed in West Virginia on the basis of "no facilities." AT&T Exh. 1A at 7.
- 4. When Verizon rejects a CLEC order on the basis of "no facilities," a CLEC will often have no choice but to place an order for special access facilities if the CLEC

⁶⁰ High capacity loops can be provided, for example, over DS1 or DS3 facilities.

intends to maintain the customer. AT&T's witnesses described this process as a "three step minuet." AT&T Exh. 1A at 4-6.

- *Step 1:* The CLEC orders the high capacity UNE DS1 loop but Verizon indicates that there are "no facilities" available.
- Step 2: The CLEC must either wait an indeterminate period of time until the facility is available at the risk of losing its customer or reorders the facility as more expensive "special access."
- Step 3: The CLEC attempts to convert the special access facility to a UNE facility.⁶¹

Id. The evidence shows that this is a time-consuming and cumbersome process.

- 5. Although the special access facility is technically identical to the UNE facility, a number to reasons the foremost being pricing makes special access a much less desirable alternative for CLECs.⁶² A DS1 special access facility can be priced many times the rate for the same facility ordered as a UNE. Moreover, Verizon's requirement that a CLEC cancel a UNE order and then resubmit it as a special access order increases the installation time. Verizon has provided no evidence that its retail sales organization and its customers suffer such delays. AT&T Exh. 1A at 5.
- 6. Verizon defends its provisioning policy on the grounds that it only has an obligation to provision DS1 facilities are UNEs only where such facilities currently exist.

 Verizon asserts that it does not have an obligation to build new facilities or add

Presumably, Verizon cannot at this point claim the "no facility" reason for not honoring that order. But the CLEC must keep track of each separate order and when the conversion of each facility can take place, because Verizon's special access hi-cap facilities have minimum service periods -- 2 months for DS1 and one year for DS3. During these minimum service periods, Verizon gets to collect the higher special access rates for the hi-cap facility for the minimum service period, or the CLEC must pay early termination penalties. AT&T Exh. 1A at 6.

The difference between access pricing and UNE pricing is that the former is not determined consistent with the TELRIC methodology.

electronics to existing facilities for the purpose of providing those facilities as an unbundled element. Verizon Exh. 8B at 27. Verizon further contends that its provisioning policies are not discriminatory because Verizon offers all comers — including CLECs—the opportunity to obtain access to such capacity at Verizon's retail rates for its special access services. *Id.* at 29.

- 7. The underlying basis for Verizon's policy is not complicated: Verizon is permitted to charge a much greater rate for provisioning a special access DS1 loop than a UNE DS1 loop which are essentially the same facility. To the extent that its policy makes it harder for a CLEC to serve a customer, Verizon has a greater opportunity to win-back that customer.
- 8. Further, there are no carrier-to-carrier metrics for special access that would feed into a self-executing performance assurance plan. As a result, Verizon could provision a special access high capacity loop as slowly as it desired without having to be concerned with any financial penalties for poor performance. In contrast, UNE provisioning is captured in the carrier-to-carrier metrics and this data funnels into the Performance Assurance Plan now before the Commission. AT&T Exh. 1A at 6.
- 9. In Virginia, the Hearing Examiner raised serious concerns after hearing evidence regarding the Verizon "no build" policy. He stated:

However, I find that to fulfill our consulting role the commission should advise the FCC that Verizon Virginia's policy has a significant and adverse effect on competition in Virginia, is inconsistently applied across UNEs, is at odds with industry accounting rules, and is inconsistent with TELRIC-pricing principles.

In the Matter of Verizon Virginia, Inc., *To Verify Compliance with the Conditions Set Forth in 47 U.S.C. § 271(c)*, Case No. PUC-2002-00046, Report of Alexander F. Skirpan, Jr., Hearing Examiner, (July 12, 2002) at 116. Apparently, as a direct result, the Virginia State Corporation Commission initiated an investigation of Verizon Virginia's "policies and practices in provisioning DS-1 UNE loops . . ."63 The results of the Virginia investigation could have direct applicability to this proceeding. Tr. II-73-74.

- 10. In addition, the Massachusetts Department of Telecommunications and Energy's recent finding that "special access is a barrier to entry for CLECs that want to compete against Verizon's retail private line services because special access services impose higher costs on CLECs that are imposed on Verizon." To remedy this problem, the Department determined that it would price intrastate special access in the same manner as UNEs. *Id*.
- 11. CLEC concerns with the Verizon "no build" policy could be at least partially allayed if this Commission like the Massachusetts Department required that Verizon price its intrastate special access consistent with the TELRIC standard.

Id.

Petition of Cavalier Telephone, LLC, For Injunction Against Verizon Virginia Inc. for Violations of Interconnection Agreement and For Expedited Relief to Order Verizon to Provision Unbundled Network Elements in Accordance with the Telecommunications Act of 1996, Case No. PUC-2002-00088 (Oct. 28, 2002).

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc., d/b/a/ Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts, D.T.E. 01-31-Phase I (May 8, 2002) at 62. The Department concluded:

Pricing special access services at UNE levels will best promote competition, protect consumers, and promote innovation in the market by enabling CLECs to better compete, thereby allowing market forces to control retail prices and service offerings.

Likewise, metrics that apply to special access intervals would help ensure that Verizon does not engage in further discriminatory treatment in provisioning high capacity loops. Pricing intrastate special access at TELRIC and developing special access ordering and provisioning metrics and penalties would provide some disincentive for Verizon to invoke its "no facilities" policy. Tr. II-73-74.

12. The Consumer Advocate Division recognized the importance of the "no facilities" issue. In his opening statement in this case, Mr. Gregg stated:

In the area of adequacy and availability of facilities, the Commission should concentrate especially on the no-build policy of Verizon to determine whether that policy thwarts competition, whether it can be and is applied in a discriminatory manner such that competitors do not have access to the same facilities and the same customers that Verizon does.

Tr. I-34.

Proposed Conclusions of Law

- 1. Verizon's conduct constitutes unlawful discrimination under 47 U.S.C. §§ 251(c)(2)(D), (3) and §§ 271(c)(2)(B)(ii), (iv). While refusing to provide loop capacity to CLECs in the form of UNEs, Verizon aggressively solicits and fills orders received from its retail end users under the same circumstances. Verizon has acknowledged that it "will build for the retail side," but not for CLECs. This discrimination constitutes a major barrier to competition in West Virginia and is inconsistent with the Telecommunications Act.
- 2. The Commission will initiate a special investigation similar to the proceeding recently ordered by the State Corporation Commission in the Commonwealth

of Virginia – to address the burdensome high capacity loop ordering process in West Virginia. The purpose of this proceeding will be to develop a non-discriminatory high capacity loop ordering and provisioning policy consistent with the Telecommunications Act and with this Commission's policies under West Virginia law.

- 3. The Commission directs Verizon and interested parties to develop intrastate special access metrics and a self-executing performance assurance plan adequate to give Verizon incentives to provision special access circuits in a timely and efficient manner. Parties should seek Commission resolution if they cannot agree on metrics and a PAP.
- 4. Verizon will price its intrastate special access services at TELRIC. If the pricing and provisioning of intrastate special access is appropriately addressed, Verizon's incentive to invoke the "no build" policy will be substantially reduced.
 - E. CHECKLIST ITEM 4 (Local Loops) and CHECKLIST ITEM 5 (Local Transport): To Cure the Serious Flaws in Verizon's Dark Fiber Practices, the Commission Should Direct Verizon to Offer CLECs Dark Fiber in West Virginia Under the Same Terms and Conditions Approved by the FCC in the Virginia Non-Price Arbitration Order.

Proposed Findings of Fact

- 1. The issue of dark fiber and its availability to CLECs has been a contentious point between Verizon and the CLECs ever since the FCC made dark fiber a UNE in the 1999 *UNE Remand Order*. In fact, Verizon opposed the designation of dark fiber as an UNE before the FCC. Having lost that decision, Verizon is still working to frustrate the CLECs' use of dark fiber. AT&T Exh. 1A (Kirchberger/Nurse Checklist) at 8.
- 2. Verizon does not make available to CLECs the necessary tools to find a network overview of available fiber. As a result, CLECs often must go through fruitless

searches for available fiber armed with inadequate information and terminating in frustration. AT&T Exh. 1A at 8-10.

- 3. Verizon requires CLECs to specify with precision the exact fiber end points in order to identify available fiber. For example, indicating a building in reasonably close proximity is not adequate for Verizon's purposes. AT&T Exh. 1A at 8.
- 4. This process is burdensome for CLECs and serves to undermine legitimate CLEC attempts to provision fiber to a customer's building. *Id.* Yet this is not all. AT&T testified:

[T]he real "Catch 22" starts after available dark fiber is identified, because Verizon does not permit a CLEC to order it until it has a collocation arrangement with a fiber termination panel (at each end). In other words, once the dark fiber is identified, the CLEC must first order the collocation arrangement – with a standard interval of 76 business days; the CLEC may not concurrently order from Verizon both the collocation arrangement and the dark fiber. However, by the time Verizon completes the collocation interval and the *second* order for fiber is submitted (in series), the fiber may then be "not available." And Verizon will not permit a CLEC to reserve dark fiber (although Verizon effectively does so for its own purposes).

AT&T Exh. 1A at 9-10.

5. The recently concluded Virginia Arbitration resolved a number of non-price issues, including dark fiber. In that proceeding, the FCC also approved specific interconnection agreement language implementing the FCC's decision regarding dark fiber. Tr. II-74-75.

- 6. In the proposed Stipulation entered into by Verizon, Staff and the Consumer Advocate Division, Verizon proposed that it would offer dark fiber terms and conditions to West Virginia CLECs consistent with the Verizon arbitration decision. Verizon Exh. 12.
- 7. Verizon indicates that it has made changes reflecting the outcome of the *Virginia Arbitration Non-Price Order* in its so-called "Model Interconnection Agreement." Verizon asserts that it will offer consistent with the Verizon Arbitration Agreement dark fiber terms and conditions reflecting Verizon's understanding of the FCC's *Virginia Arbitration Non-Price Order*. Verizon Exh. 8B at 54. The Model Interconnection Agreement language, however, is merely an opening offer in the course of negotiations; its terms and conditions has been approved by no Commission and it is not binding on any party. To the extent that a party disagreed with Verizon's proposed language language not approved by this Commission or the FCC it might still be required to engage in a full arbitration. Verizon has yet to implement methods and procedures to implement all of its obligations under the Virginia Arbitration. Tr. II-76.
- 8. Verizon, however, has not committed to offering the specific terms and conditions approved by the FCC in a tariff or any other general offering. Therefore, a carrier would not gain the benefit of the FCC's resolution of the dark fiber issue unless it were in the midst of interconnection agreement negotiations.

Proposed Conclusions of Law

1. Checklist Item 4 (local loops) and Checklist Item 5 (local transport) obligate Verizon to make dark fiber available to CLECs in the same manner as Verizon uses such fiber itself, *i.e.*, on nondiscriminatory terms and conditions at technically

feasible points. Verizon failed to demonstrate on the record in this proceeding that it complies with these two Checklist Items with respect to dark fiber.

- 2. To remedy this situation, Verizon shall tariff the same dark fiber terms and conditions in West Virginia as the FCC adopted in the Virginia arbitration. Tr. II-74-75. By using the tariffing process, CLECs can immediately take advantage of the more favorable terms and conditions associated with dark fiber.⁶⁵ Moreover, Verizon should offer to any CLEC who wants it the Virginia interconnection agreement language approved by the FCC. This simple solution will help resolve Verizon's problematic dark fiber process, and will enable this Commission to find that Verizon has met Checklist Items 4 and 5 with respect to the dark fiber issue.
 - F. CHECKLIST ITEM 4 (Local Loops) AND CHECKLIST ITEM 5 (Local Transport): Inasmuch as Verizon's OSS for CLECs to Order New EELs Burdens CLECs with Unreasonable Costs and Delays, the Commission Should Require Verizon to Implement the Same Ordering Processes in Maryland That are Already in Place in Massachusetts and Rhode Island.

Proposed Findings of Fact

1. An EEL – or an Enhanced Extended Loop – is generally the combination of an interoffice facility ("IOF"), a loop or loops and a multiplexer if the IOF and the loops are different speeds. AT&T Exh. 2 (Kirchberger/Nurse OSS) at 42. Often a CLEC will use an EEL when it is uneconomic to collocate at a certain central office perhaps because of the population density of the area intended to be served. Under Verizon's current ordering process in West Virginia, when the IOF and the loops are of different speeds (e.g., a DS1 IOF combined with a DS0 loop) the CLEC must make separate orders

43

_

⁶⁵ CLECs would not have to wait until modifying its interconnection agreement before getting the benefits of the new language. As such, prohibitive litigation costs could be avoided.

for the loop and the IOF. *Id.* at 42-43. Verizon would begin charging for the IOF even though the subtending loops have not yet been provisioned. The loop provisioning intervals may be as long as 15 days and could be dependent on whether the loop is even available. *Id.* at 42.

- 2. The Verizon EEL provisioning process is cumbersome and expensive. CLECs are placed at a competitive disadvantage due to the nature of EEL provisioning. *Id.* at 43.
- 3. Other state commissions have addressed and improved Verizon's EEL ordering process. In Massachusetts, a CLEC may place an order for the backbone EEL element (the IOF) as well as the lower speed EEL loop at the very same time.⁶⁶ Although the precise ordering process posed an administrative problem for Verizon MA, it was nevertheless able to design a manual work-around solution that allowed Verizon to comply with the Department's order.⁶⁷ The result is that in Massachusetts unlike West Virginia a CLEC does not pay for an EEL until the CLEC has end-to-end connectivity. *Id.* A similar ordering process is in place in Rhode Island. Tr. II-72.

Proposed Conclusions of Law

1. The process for ordering an EEL is expensive, slow and inefficient creating delays for the provisioning of new services to customers. This arduous process discriminates against CLECs and further demonstrates that Verizon does not meet Checklist Item 4 (local loops) and Checklist Item 5 (local transport).

These orders must be on separate Access Service Requests ("ASRs") that are related and submitted at the same time.

Even though the order cannot be submitted on a single ASR, Verizon MA demonstrated compliance with the Commission order via a "manual work-around." Through this manual work-around, the CLEC would order two separate, but related, ASRs.

- 2. Before this Commission will endorse Verizon's 271 application to the FCC, Verizon must commit, in writing, that it will permit coordinated rather than sequential ordering and not charge for an EEL until it is fully functional (*i.e.*, until the CLEC has end-to-end connectivity). It is the intention of this Commission that Verizon West Virginia implement a process consistent with the Massachusetts and Rhode Island processes for ordering EELs.
- 3. Upon evidencing compliance with this requirement, the Commission will then be in a position to find Verizon in compliance regarding Checklist Items 4 and 5 as those items relate to EEL ordering and provisioning.
- G. CHECKLIST ITEM 8 (Directory Listings): To Help Ensure That Verizon Provides Reasonable and Nondiscriminatory Access to Directory Listings, the Commission Should (1) Require Verizon to Undertake a Special Study of the VIS Directory Listing Database in West Virginia as was Done in Virginia, and (2) Direct That Verizon May Not Charge (or Backbill) for Directory Listings Inquiries.

Recommended Findings of Fact

- 1. Verizon fails to provide nondiscriminatory access to directory listings in accordance with Checklist Item 8. The process utilized by Verizon for directory listings for wholesale customers has numerous deficiencies especially when compared with the processes used for Verizon's own retail customers.
- 2. The accuracy of Verizon's directory listings for CLEC customers has been shown to be problematic in West Virginia. The record is rife with examples of serious directory listings errors experienced by West Virginia CLECs. ⁶⁸ FiberNet, Stratuswave

Joint Exhibit 1, Workshop Supplemental Final Report at 2; *See also* Final Report at 5; Seventh Interim Report at 13; Sixth Interim Report at 9; Corrected Interim Report at 11-16; First Interim Report at 12.

and NTELOS have demonstrated West-Virginia-specific current occurrences of directory listings errors that have significantly affected their customers. Indeed, in response to directory listings problems that came to light during the Workshops, Verizon was forced to revise the listings in four different West Virginia directories.⁶⁹

- 3. The process by which a CLEC obtains a white pages listing for its customer contains a number of vulnerable areas where the CLEC listing may become corrupted.⁷⁰
 - First, a CLEC orders the directory listing through a Local Service Request ("LSR").
 - Second, Verizon responds to the LSR through an LSR Confirmation ("LSRC").
 - Third, the order goes to Verizon's Service Order Processor where a Service Order is created that tasks various Verizon internal departments to complete work consistent with the LSR. The CLEC is sent a provisioning completion notice ("PCN") and a billing completion notice ("BCN") when Verizon completes the provisioning and data base update steps, respectively.
 - Fourth, the Service Order proceeds to the Directory Assistance ("DA") database and separately to Verizon's directory listing publishing affiliate, Verizon Information Services ("VIS").
- 4. This complex process can generate a significant number of errors that ultimately may result in an inaccurate white pages listing apparently at a higher error rate for CLECs than for Verizon's own retail customers.⁷¹

⁶⁹ AT&T Exhibit 1 (Kirchberger/Nurse Checklist) at ¶ 32.

AT&T Exhibit 1 (Kirchberger/Nurse Checklist) at ¶¶ 34-35.

AT&T Exhibit 1 (Kirchberger/Nurse Checklist) at ¶¶ 30 and 32, footnote 18; *See also*, Tr. at I-113-115.

- 5. The accuracy of *directory listings* was never tested by KPMG and there is no current metric associated with directory listing accuracy tied to Verizon's self-executing performance plan. ⁷²
- 6. The implications for CLECs for an inaccurate directory listing are severe and cannot be easily remedied. The CLEC customer must bear the implications of the error for a whole year, *i.e.*, until the next directory is published.⁷³ Such errors are particularly harmful to CLECs attempting to enter the local market, even if Verizon is ultimately to blame. In any case, directory listing errors reflect poorly on the CLEC, because the customer is apt to blame the CLEC regardless of the source of the error. *Id.*
- 7. The process relied upon to verify the accuracy of the directory listings is burdensome and simply not workable. Verizon has stated that when a CLEC submits an LSR, the LSR Conformation ("LSRC") and the billing completion notice ("BCN") should contain all of the information for the CLEC to verify the accuracy of its order for a simple listing. Tr. I-117 (Toothman). This aspect of the process verifying the accuracy of the information contained on the LSRC or BCN seems reasonable.⁷⁴
- 8. Verizon, however, acknowledges that errors can be introduced at other points in the directory listings process. For example, even *after* the order goes from the service order processor to the VIS directory listings database, changes can introduce

AT&T Exhibit 1 (Kirchberger/Nurse Checklist) at ¶ 33. Metric OR-6-04 will be implemented by Verizon in the West Virginia Carrier-to-Carrier Guidelines, but is not part of the incentive payments of the PAP proposed to be adopted by the Commission. Metric OR-6-04 measures a sample of Verizon's manual internal Service Orders against the CLEC's LSRs. It does not compare the LSRs to the VIS database of listings.

AT&T Exhibit 1 (Kirchberger/Nurse Checklist) at ¶ 29. AT&T's panel notes that the "loose leaf errata directory sheets are no substitute" for a correct listing in the white page directory.

listing errors.⁷⁵ As a result, it is necessary that the CLEC continually verify the accuracy of the listing.

- 9. After the listing is entered in the VIS database, Verizon provides CLECs "opportunities" to confirm that the directory listing is *still* accurate. Verizon provides CLECs with a Listing Verification Report ("LVR") approximately 30 days prior to the closing date for directory publication. ⁷⁶
- 10. Even if a CLEC received and reviewed the LVR 30 days prior to the publication cutoff date, subsequent activity could still incorrectly alter the listing. But, if the CLEC did not review the LVR until closer to the publication deadline, it might not have sufficient time to make a thorough review.
- 11. Verizon is now urging CLECs to utilize another, supposedly superior, "tool" in lieu of the LSRC to verify the directory listings, the directory listings inquiry ("DLI"). Tr. I-118 (Toothman).
- 12. However, the DLI can only be used one order at a time. That is, if a CLEC has 1000 orders, it must dip into the database 1000 times. This could become expensive for the CLEC, and another revenue source for Verizon. Verizon's

AT&T's witnesses recognized that a CLEC is responsible for any errors that it submits to Verizon. AT&T Exhibit 1 (Kirchberger/Nurse Checklist) at ¶ 39, footnote 26.

Tr. at I-117 (Toothman)("[W]e came to realize that maybe that's not the best approach for a CLEC because that information that is returned on the ...confirmation and the billing completion notice, is just the information at that point in time. It could be subsequently changed prior to submission to the directory organization, or VIS").

AT&T Exhibit 1 (Kirchberger/Nurse Checklist) at ¶ 41.

interconnection agreements contain a per inquiry (per dip) charge of \$0.24 to \$0.27 for "pre order" inquiries such as the DLI. ⁷⁷

- 13. Verizon's witness Ms. McLean claimed that Verizon has not imposed this charge on CLECs. Tr. I-119-121 (McLean). She explained that because Verizon is trying to encourage CLECs to use the directory listings inquiry process, it does not intend to charge for dips into the "pre order" database.
- 14. There is an obvious inconsistency between Ms. McLean's testimony and the language in Verizon's interconnection agreements. While Verizon claims it does not bill for such dips on a per query basis, such charges do appear in interconnection agreements including Verizon's Model Interconnection Agreement and the pricing list in Verizon's most recent proposal to AT&T for an interconnection agreement in Virginia, Tr. I-121-122 (McLean). Therefore, despite Ms. McLean's promises, Verizon could at any time institute such per query charges, and indeed backbill for charges not previously billed, because interconnection agreement trump any other oral promises or representations.
- 15. Moreover, all of these verification processes the LSRC, the BCN, the LVR and the DLI -- shift to the CLECs the entire burden and costs of confirming the accuracy of the listings. Verizon has never addressed the simple question of why the CLECs should be forced to verify continually information that should have been provided in the LSR Confirmation.⁷⁸

The interconnection agreement between AT&T and Verizon as proposed by Verizon to AT&T on November 4, 2002, contains a per query charge of 24¢ (AT&T Exhibit No. 5), while Verizon's Model Interconnection Agreement contains a per query charge of 27¢.

AT&T Exhibit 1 (Kirchberger/Nurse Checklist) at ¶¶ 39-42.

- 16. Moreover, these same problems are not faced by Verizon's retail operations because the retail reps feed the customer information directly into a system that has real-time edits and interaction with Verizon back-office systems. For example, Verizon's retail operations do not review the LVR, yet Verizon's directory listings appear to be remarkably error-free.⁷⁹
- 17. Furthermore, in the Virginia OSS test, KPMG did not test directory listings to determine whether they actually appeared in the printed directories either white pages or yellow pages because all of KPMG's listings were unpublished numbers. Instead, KPMG simply checked the separate directory *assistance* database to see whether its numbers showed up as unpublished.⁸⁰
- 18. Thus, the KPMG test cannot stand for the proposition that KPMG tested directory listings. By design, KPMG did not ever undertake such a test.
- 19. Accordingly, since KPMG had no relevant test of directory listings, it had no subsequent test of the process to detect and correct errors and omissions. KPMG did not test the Listings Verification Report (LVR) for Directory Listings, although it recognizes that this is the process Verizon establishes for CLECs to use.⁸¹
- 20. KPMG's failure to test directory listings in Virginia is a serious omission given the importance of accurate directory listings to CLECs, and the number and nature of the errors that were demonstrated by the CLECs in West Virginia.

⁷⁹ AT&T Exhibit 1 (Kirchberger/Nurse Checklist) at ¶ 43.

AT&T Exhibit 2 (Kirchberger/Nurse OSS) at ¶ 50.

AT&T Exhibit 2 (Kirchberger/Nurse OSS) at ¶ 50.

- 21. As AT&T's witnesses testified, "[t]he fundamental problem is that there is no end-to-end process that verifies that the final result the printed directory will be comparably free of Verizon errors. Verizon's responsibility does not end at the point that it hands the directory listings data off to VIS."82
- 22. To help overcome the problems inherent in its standard directory listings processes, Verizon conducted a Special Study in Virginia. The Virginia Special Study of directory listings explored the accuracy of the process from the Service Order written by Verizon to the update of the VIS database. Tr. I-104(McLean). This is the link in the directory listings process that was never tested by KPMG in Virginia.
- Order to the VIS database -- would help to confirm whether directory listings reflect the data contained in the Verizon Service Order. While Verizon does not believe that a special study of this kind is needed in West Virginia (Tr. at I-111-112 (McLean)), this Commission does not agree. We find that the directory listing errors thus far uncovered in West Virginia directories warrants a closer look at Verizon's performance over a limited, six-month period. And we are not persuaded that the Virginia special study results obviate the need for such a study in this State.

Recommended Conclusions of Law

1. The Commission will require Verizon to engage in a six-month Special Study of West Virginia directory listings like the one recently conducted on directory listings in Virginia.

AT&T Exhibit 1 (Kirchberger/Nurse Checklist) at ¶ 45.

- 2. The Commission will not support Verizon WV's application for 271 authority before the FCC unless Verizon commits in writing by an officer empowered to commit the company that it will not charge (or backbill) for directory listings inquiry (DLI) queries.
- 3. Moreover, the Commission will require that any future flat-rated charge for preorder queries, as may be proposed by Verizon WV, shall be developed without regard to the volume of queries associated with the DLI.

H. CHECKLIST ITEM 13 (Reciprocal Compensation): Verizon Is Not In Compliance with the FCC's Intercarrier Compensation Order.

Recommended Findings of Fact

1. In its *Intercarrier Compensation Order* issued in April 2001, the FCC established a rebuttable presumption that, for the future, all traffic above a 3:1 terminating to originating ratio is presumed to be ISP-bound traffic subject to an interim transitional compensation mechanism.⁸³ Compensation for ISP-bound traffic (*i.e.*, traffic exceeding the 3:1 ratio) is capped at a minute-of-use rate that will gradually decline over a 36-month period.⁸⁴ The FCC is now considering whether "bill and keep" should be adopted as a permanent cost recovery mechanism.⁸⁵

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP Traffic, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order (April 27, 2001) ("Intercarrier Compensation Order").

⁸⁴ Intercarrier Compensation Order, ¶ 77-79.

⁸⁵ Intercarrier Compensation Order, \P 6.

2. In Paragraph 334 of its Checklist Declaration, Verizon asserts without reservation that it has implemented the provisions of the FCC's *Intercarrier Compensation Order*. Verizon Exh. 2, ¶ 334. Yet, Verizon qualifies its assertion:

Accordingly, to the extent that Verizon WV is exchanging Internet-bound traffic and traffic properly subject to reciprocal compensation under the Act, and is required by an interconnection agreement to pay reciprocal compensation on local traffic, Verizon WV will apply the presumption that traffic that exceeds a 3:1 ratio of terminating to originating is Internet-bound traffic.

Id.

- 3. The evidence shows that Verizon is not complying with its reciprocal compensation obligations. First, Verizon does not explain what it means by traffic "properly subject to reciprocal compensation under the Act." Second, Verizon does not explain what it means when it states that it will apply the FCC-mandated ratio only if "required by an interconnection agreement to pay reciprocal compensation on local traffic."
- 4. Most significantly, Verizon WV acknowledged on cross-examination that it continues to pay zero compensation on traffic exceeding the 3:1 inbound to outbound ratio despite the specific rate scheme for such traffic adopted by the FCC in the *Intercarrier Compensation Order*.⁸⁶ Tr. at I-147-48. Although Verizon's sister

Under the *Intercarrier Compensation Order all* traffic in excess of 3:1 is eligible for the compensation under the declining FCC Intercarrier compensation rate. All traffic up to the 3:1 ratio is considered pure local traffic (not ISP-bound) and is compensable at the Commission's reciprocal compensation rate.

companies compensate carriers for terminating traffic in excess of the 3:1 ratio, under identical interconnection agreements, no carriers are being compensated in West Virginia. Tr. at I-147-48.

Recommended Conclusions of Law

- 1. Verizon has failed to evidence that it is currently in compliance with the FCC's *Intercarrier Compensation Order*. Verizon incorrectly interprets the FCC's order to limit the payment of intercarrier compensation to certain CLECs for traffic in excess of 3:1 inbound to outbound on or after June 14, 2001. Verizon has not compensated any carrier that terminated traffic in excess of the 3:1 ratio as required by the FCC. As a result, Verizon has not met its burden to demonstrate that it meets the reciprocal compensation obligations of Checklist Item 13.
- 2. Verizon shall pay intercarrier compensation to AT&T and other CLECs, at the rates prescribed by the FCC, for traffic in excess of the 3:1 inbound to outbound ratio notwithstanding Verizon's interpretation of the FCC's *Intercarrier Compensation Order*. The Commission will not endorse Verizon's compliance on Checklist Item 13 until Verizon conclusively demonstrates that it adheres to the FCC's *Intercarrier Compensation Order*.
 - I. Verizon Should Be Required to Assist the Commission's Staff to Replicate the Carrier-to-Carrier ("C2C") Metrics in West Virginia, Either Directly or With Third Party Assistance, and in Furtherance of that Endeavor and to Allow CLECs to Replicate Metrics Results -- Should Be Required to Publish the Metrics Business Rules for West Virginia.

Recommended Findings of Fact

1. The replication of the West Virginia C2C metrics and the publication of metrics business rules for West Virginia are important because the accurate reporting of

the C2C metrics is one significant way to help ensure that the Operations Support Systems ("OSS") that Verizon uses to provide wholesale services to CLECs do and continue to provide nondiscriminatory access, so that CLECs may enter and provide competitive local exchange services to West Virginia consumers, both residential and business, as well as rural and urban.

- 2. OSS forms a critical link in the ability of CLECs to irreversibly enter the local market. The FCC "consistently has found that nondiscriminatory access to OSS is a prerequisite to the development of meaningful local competition." If OSS is prone to error or is unstable, CLECs cannot successfully enter or remain in the local market on a meaningful scale.
- 3. The Commission is concerned not only that the OSS supports irreversible entry for large business, but also that the OSS supports irreversible entry for West Virginia's residential users, on a mass market basis.
- 4. In light of the importance of OSS to a competitive local exchange market, the Commission must be assured that Verizon West Virginia has complied with its OSS obligations as required by the § 271 competitive checklist. This can be achieved, in part at least, by ensuring that the C2C metrics results reported by Verizon West Virginia comport with reality.
 - 5. The Commission's continued oversight in this regard is vitally important,

the Telecommunications Act of 1996, CC Docket No. 96-98 (released August 8, 1996) ("Local Competition Order"), \P 518. See also id., \P 522 ("We find that such operations support systems

Memorandum Opinion and Order, Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Communications Act of 1996 to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65 (released June 30, 2000) ¶ 92; First Report and Order, Implementation of the Local Competition Provisions in

because Verizon has no particular incentive to provide CLECs -- its competitors -- with good OSS performance. The better the OSS works, the easier it is for CLECs to compete and for customers to move their services from Verizon to a CLEC.⁸⁸

- 6. The Commission cannot simply rely on the KPMG test in Virginia because it was limited in scope in crucial respects. The important functions that were not tested by KPMG include the following: (a) electronic billing and the billing of reciprocal compensation; (b) accuracy and reliability of the metrics, specifically compliance with OSS business rules, verification of metrics change control, and validation of the correctness (and stability) of the retail analogs for the parity metrics; (c) actual provisioning of orders in a high volume environment; (d) billing claims, escalations, and the posting of billing credits; (e) actual directory listings publications in the telephone book, or at least the VIS data base used to generate the directory listings publication; (f) actual collocation; and (g) high capacity loop and interoffice circuit order processes and end-to-end trouble report processing for special circuits, including EELs.⁸⁹
- 7. In addition, the KPMG test has inherent limitations that preclude total reliance on it to prove in Verizon's OSS. The test is a snapshot in time and does not prove that Verizon *actually* provides adequate OSS, but at best, only that the OSS is capable of providing adequate OSS.⁹⁰ The KPMG test was designed to test many aspects

functions are essential to the ability of competitors to provide services in a fully competitive local services market").

AT&T Exhibit 2 (Kirchberger/Nurse OSS) at ¶¶ 16-17.

AT&T Exhibit 2 (Kirchberger/Nurse OSS) at ¶¶ 22-54. *See also* MD Tr. at 1308-1315; 1327-1333 (Joint Exhibit 3, Cross-examination of KPMG).

AT&T Exhibit 2 (Kirchberger/Nurse OSS) at ¶ 55. See also MD Tr. at 1285 (Joint Exhibit 3, Cross-examination of KPMG).

of the OSS piecemeal rather than end-to-end, leading to relaxed actual standards for the total end-to-end process (*Id.* at ¶ 58).⁹¹ The KPMG test also applied a "p-value" to benchmark metrics that lowered the benchmark standards in some instances, translating a "fail" into a "pass (*Id.* at ¶ 59). The volume testing part of the KPMG test also did not test through to completion of volume test orders, as the KPMG witness in Maryland acknowledged.⁹² The volume test ended with the sending of confirmations that a transaction was received by Verizon, and did not test provisioning and billing completion notifiers (PCNs and BCNs), maintenance and repair, and billing (*Id.*).

8. It also failed to reflect real world experience of the CLECs, which experience far more errors that the KPMG test uncovered. For example, while KPMG gave Verizon a pass on directory listings in Virginia, the West Virginia, Virginia and Maryland case records are heavy with evidence that CLEC directory listings in fact have been bungled by Verizon. As reported by Consumer Advocate Billy Jack Gregg in the Workshop Supplemental Final Report, "directory listings problems are a major unresolved issue." Indeed, Verizon's own investigation confirmed 114 CLEC directory listing errors in just four West Virginia directories out of 11,182 *total* CLEC listings in those directories, for error rates between 0.67% and 1.60%. If these errors had been compared to directory listing *changes* as we believe they should have been, rather than

See also MD Tr. at 1337 (Joint Exhibit 3, Cross-examination of KPMG).

MD Tr. at 1287-1288 (Joint Exhibit 3, Cross-examination of KPMG).

Joint Exhibit 1, Workshop Supplemental Final Report at 2; *See also* Final Report at 5; Seventh Interim Report at 13; Sixth Interim Report at 9; Corrected Interim Report at 11-16; First Interim Report at 12.

⁹⁴ AT&T Exhibit 1 (Kirchberger/Nurse Checklist) at ¶ 32.

total listings, the error rates would be far higher. Tr. at I-106-107. Verizon has made no showing that its own error rates are anywhere near as high.

- 9. In addition, Verizon itself acknowledged a long-standing systemic usage billing problem in which minutes of use were improperly inflated for UNE-P accounts that were converted from CRIS to expressTRAK, leading to double billing of those minutes of use. 95 This billing problem affected four West Virginia CLECs and their customers. *Id.* at 94. The double billing was caused by minutes of use being accrued in both CRIS and expressTRAK for accounts that had been transitioned from SOACS to expressTRAK. The problem was caused by a software modification implemented in March, 2001 and was not corrected until May 19, 2002, a 14-month period that spanned the KPMG test period. Yet, KPMG did not discover this error because it only tested expressTRAK bills and not the CRIS system. 96 And in September 2002 Verizon managed to erroneously send 5628 pages of AT&T's Customer Service Records ("CSRs") to Cavalier, which obviously raises a potentially serious issue of Verizon's billing systems for safeguarding CLECs' Customer Proprietary Network Information ("CPNI"). A similar error occurred two other times. 97
- 10. Likewise, the PwC "sameness" attestation at best simply ports the errors and the omissions of the underlying KPMG test from Virginia into West Virginia. That

Tr. at I-93-96. *See also* Federal Communications Commission, WC Docket No. 02-214, Joint Reply Declaration of Kathleen McLean, Raymond Wierzbicki, and Catherine T. Webster (September 12, 2002), at ¶ 56.

Tr. at I-96. *See also* Maryland PSC Case No. 8921 (*Verizon Maryland 271 Proceeding*), Thursday, October 31, 2002, Tr. at 1312-1313 (Joint Exhibit 3, Cross-examination of KPMG).

⁹⁷ Tr. at I-97-98.

is, if the OSS functions well in Virginia, PwC says it will function well in West Virginia.

But by the same token, if it misfires in Virginia, it will also misfire in West Virginia. 98

- 11. Moreover, although there is substantial commonality between the OSS in the Verizon ex-C&P states, there is also some degree of difference. In Maryland there was evidence of as much as 20 to 30 percent difference between the Virginia and Maryland OSS.⁹⁹ While it is not clear that the same differences would apply to West Virginia OSS, we believe that this Commission should take no undue risks in this regard. In addition, the metrics currently proposed for West Virginia are not the same metrics that were tested in Virginia. For these reasons, there is little assurance that the results of the OSS test by KPMG in Virginia still hold value in West Virginia today.
- 12. Since the end of the Virginia test Verizon has announced it will be reducing its work force by 10,000 jobs, which provides this Commission little comfort that Verizon West Virginia will be able to accurately and timely process future mass market order volumes. ¹⁰⁰ Indeed, it appears that a disproportionate amount of the reduction in force is being borne by Verizon's wholesale services operations. About 1000 of those reductions fully 10% of the total -- will affect Verizon's wholesale support functions, which are being reduced from approximately 11,000 to 10,000 personnel, about a 9% reduction in wholesale services staffing. ¹⁰¹
 - 13. Replication of the C2C metrics results reported by Verizon WV will help

⁹⁸ Tr. at I-61-62.

MD PSC Case 8921, October 31, 2002, Tr. at 1338-1344 (Joint Exhibit 3, Cross-examination of KPMG).

¹⁰⁰ See http://www.newsday.com/business/ny-bzveri052611205mar05.story?coll=ny%2Dbusiness%2Dutility.

Verizon WV Response to AT&T Discovery Request 6-5.

to ensure that Verizon's OSS functions in a nondiscriminatory manner, as required by the Act. In Virginia, the Commission and its Staff thought replication important enough to task the Staff with that effort, at least for an initial six month period. In the Maryland 271 proceedings, Verizon agreed to assist the Staff with replication efforts and was willing to discuss possible KPMG help at Verizon's expense, as was done in Virginia. The Commission does not want West Virginia, having foregone third party testing in reliance on the putative portability of the Virginia third party test results, to be in any worse situation than Maryland Commission with respect to the ability to replicate the metrics results reported by Verizon.

- 14. However, replication will not be successful unless the Staff has at its disposal the complete set of metrics business rules that will be required, without more, to duplicate Verizon's results. The metrics business rules are the documentation containing the specific rules to be used by Verizon in the implementation of the C2C Guidelines.
- 15. The Virginia Commission Staff ran into substantial difficulties with its replication efforts in Virginia and required considerable assistance from Verizon and KPMG, as often as on a daily basis.¹⁰³ In part at least, this is because the metrics business rules were not required to be published in Virginia, unlike in New Jersey, requiring recourse by the Staff to unpublished information in order to be able to successfully replicate Verizon's metrics results.
 - 16. The problems included updates and changes to the algorithms or test IDs

¹⁰³ Joint Exhibit 3, MD Tr. at 1317-1321. (Virginia 271 Tr. at 1255).

Joint Exhibit 3, MD Tr. at 1322-1327.

that were not communicated to the Virginia Staff,¹⁰⁴ and incomplete data and subsequent changes to data that were not published.¹⁰⁵ The Virginia Staff received special Change Control Records ("CCRs") that included "additional information necessary for Staff's replication project."¹⁰⁶

- 17. Such special CCRs are not published or available to CLECs. If a CLEC wished to check Verizon's numbers it apparently could not do so successfully using just the CCRs submitted pursuant to the C2C guidelines. The CLEC would need the special CCRs that the Virginia Staff received, but ironically would not be able to get them because the additional information is allegedly proprietary.¹⁰⁷
- 18. That is inconsistent with the very purpose of the Change Control provisions of the C2C Guidelines, which are intended to be complete and timely descriptors of changes to the metrics, sufficient to allow replication without more. KPMG itself conceded that it had to rely on undocumented non-public information from Verizon subject matter experts in order to synchronize KPMG's metrics replication effort, and keep that effort synchronized over time.¹⁰⁸
- 19. The publication of the full set of business rules is important not just to assist the Staff in replicating Verizon's metrics results, but also to allow the CLECs to engage in such replication.

Joint Exhibit 3, Virginia 271 Exhibit 101 at 3.

¹⁰⁵ Joint Exhibit 3, Virginia 271 Tr. at 1257-1258.

Joint Exhibit 3, Virginia 271 Exhibit 101 at 4.

Joint Exhibit 3, Virginia 271 Tr. at 961-963.

Joint Exhibit 3, Virginia KPMG Workshop transcript at 445-446.

- 20. The Commission will order the replication of the West Virginia C2C metrics and the publication of metrics business rules for West Virginia. The accurate reporting of the C2C metrics is one significant way to help ensure that the OSS that Verizon uses provide nondiscriminatory access to CLECs, so that competition in local exchange services in West Virginia may finally get off the ground.
- 21. Verizon claims that a full replication is unwarranted, that a sampling will do (Tr. at II-311-312 (Canny)). Given the documented shortcomings of the KPMG test and the staleness of the KPMG data related to the metrics in force in West Virginia today, a sampling would not provide the assurance of nondiscriminatory OSS performance that the Commission insists upon. If a period of six months of full replication demonstrates that the Commission can rely upon a sampling, it can order a change at the request of the Staff.

Recommended Conclusions of Law

- 1. As a condition of this Commission's endorsement of Verizon's § 271 application, this Commission will require Verizon WV to assist its Staff in whatever way is required to allow the Staff to replicate Verizon WV's C2C metrics results in West Virginia, including third party assistance if needed, for a minimum six-month period.
- 2. To assist the replication effort, and equally important to allow CLECs to replicate Verizon's metrics results, the Commission will also require, as a pre-condition of its endorsement of Verizon's § 271 application to the FCC, that Verizon publish the full set of metrics business rules that will be needed for successful replication.

J. Verizon Should be Required to Explicitly Commit That It Will Not Challenge the Commission's Authority to Adopt, Enforce, or Modify the Performance Assurance Plan ("PAP") Pursuant to the Change Provisions of the PAP.

Recommended Findings of Fact

- 1. Verizon's commitment to the PAP it has filed in West Virginia is less than certain after it achieves interLATA long distance authority in West Virginia from the FCC, because Verizon reserves the right to challenge what it perceives to be the Commission's lack of authority to impose a performance assurance plan on Verizon West Virginia. Tr. at III-271-274 (Canny).
- 2. This means that the Commission has no assurance whatsoever that the PAP filed by Verizon will survive Verizon's entry into the West Virginia interLATA long distance market.
- 3. This is so despite the fact that Verizon has agreed to the change provisions incorporated into the PAP. The PAP itself incorporates three specific change provisions that Verizon has purportedly "voluntarily" agreed to, as part of the PAP that it has "voluntarily" filed. These change provisions are (1) the annual review by the Commission, (2) the importation of changes from the New York Carrier Working Group, and (3) "other changes" suggested by the Commission, Verizon or any CLEC at any time. 109
- 4. That Verizon's agreement to the change provisions incorporated into the PAP itself does not temper Verizon's reserved right to challenge the Commission's authority to adopt, enforce or modify the PAP was clarified in Ms. Canny's testimony.

West Virginia PAP at ¶ II.K.1 through II.K.3.

Ms. Canny made abundantly clear that Verizon believes it can challenge on jurisdictional – or any other – grounds any changes that Verizon did not agree with, made pursuant to the change provisions incorporated in the PAP. ¹¹⁰

- 5. Verizon's potential challenges to the Commission's authority to amend the PAP in ways that Verizon does not agree with is in direct contravention to the important role that the PAP plays in ensuring continually open local exchange markets in West Virginia. The FCC relies upon state commissions' active oversight of incentive plans such as the PAP, and the commissions' modification of such plans as may be necessary to meet changing requirements, to assure itself that markets within the state remain open to competition.¹¹¹ Absent such oversight and adjustments to the PAP by the West Virginia Commission as needed, there can be no assurance that the West Virginia local exchange market is or remains irreversibly open to competition.
- 6. Verizon's potential challenge to the West Virginia PAP after 271 entry is not merely a conjectural concern, given recent developments in New Jersey.
- 7. Verizon's affiliate in New Jersey expressly relied on the PAP there as evidence of its compliance with Section 271 (Tr. III-276 (Canny)), and consequently

Tr. at III-271 (Canny): "Q: If changes are made through any of these three methods that are listed in the PAP, are you bound to those changes? A: To the extent that they – that Verizon is in agreement with those changes, yes. Q: So if you were not in agreement with those changes, you reserve the right to challenge those changes? A: Just the changes, yes.".

See, e.g., In the Matter of Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in New Jersey, Memorandum Opinion and Order, WC Docket No. 02-67, June 24, 2002, at ¶176 ("The [Incentive Plan], in combination with the New Jersey Board's active oversight of the IP and its stated intent to undertake a comprehensive review to determine whether modifications are necessary, provides additional assurance that the market will remain open").

gained Section 271 approval in June 2002.¹¹² Just three months later Verizon challenged in court the New Jersey Board of Public Utilities' imposition of parts of the New Jersey performance incentive plan on the basis, *inter alia*, that the Board lacks the authority to impose such a plan.¹¹³ Tr. III-274 (Canny).

- 8. The order of the Board that Verizon NJ seeks to stay and eventually overturn was adopted on March 28, 2002, long before Verizon NJ obtained its 271 authority in that state indeed, before Verizon NJ filed its second application with the FCC for 271 authority in New Jersey. Nowhere in that second application did Verizon NJ say that it would not comply with any part of the Board's performance incentive plan, including that part of it modified by the Board's March 28, 2002 Order. 114
- 9. It is obvious that there is a serious potential for similar claims against this Commission, in the event that the Commission should decide that it would be in the best interests of the West Virginia public to make revisions to the PAP with which Verizon did not agree.
- 10. Such claims would in themselves pose a serious threat to competition in West Virginia and, by definition, foreclose a finding that Verizon's West Virginia local markets are irreversibly open to competition. Even a potential future claim challenging the Commission's authority to impose self-executing remedies threatens competition and

Federal Communications Commission, WC Docket No. 02-67, Memorandum Opinion and Order (June 24, 2002) ("New Jersey 271 Order").

Superior Court of New Jersey, Appellate Division, Docket No. A-576-02-T2, Brief on Behalf of Verizon New Jersey Inc. in Support of its Motion for a Stay, filed September 27, 2002, at 15-20. Verizon also challenged the New Jersey Board's Incentive Plan revisions on procedural and due process grounds, *Id.* at 20-34.

The March 28, 2002 Order modified certain provisions of the New Jersey incentive plan pertaining to the filing of accurate and timely performance reports and the refiling of corrected reports in a timely manner.

assures that such competition will remain reversible, contrary to the requirements of § 271 of the Act.

- 11. Self-executing remedies such as the PAP are a primary regulatory tool which, if aggressive enough, can prevent backsliding and the reversal of competitive development by Verizon. The PAP provides incentives for Verizon to treat its wholesale customers the same as it treats its own retail services. We find such parity of treatment critical to the development of competition in the West Virginia local exchange market. Verizon itself recognizes the important role that effective PAP provisions play in the competitive process and that the proposed PAP for West Virginia is an essential part of Verizon's application before this Commission (Tr. at III-277 (Canny). Verizon's claim of veto power over remedies thus threatens the very fabric of the 271 process and the Commission's oversight authority.
- 12. Verizon's position that the Commission lacks authority to adopt the PAP demonstrates that Verizon's acquiescence to the PAP may be a transitory thing that will survive only until Verizon WV obtains 271 authority in West Virginia.
- 13. In addition, because of the critical role of the PAP in ensuring equal treatment of CLECs and open markets in West Virginia, the Commission disagrees with the PAP implementation date proposed by Verizon. The Commission finds that it is critical that performance be measured and remedies be paid even before Verizon's entry into interLATA long distance, in order to assure that the level of competition in West Virginia can be sustained and perhaps grow regardless of Verizon's long distance plans for this State. We also note that Verizon's proposed implementation date (the month after the month in which Verizon obtains 271 authority from the FCC) would

delay the effectiveness of the PAP by as much as a full month after Verizon is enabled to enter the interLATA long distance market in the State (Tr. at III-276 (Canny)), and as much as four months after we have ruled on Verizon's application in this case.

14. Accordingly, the Commission will require that the PAP as proposed will become effective as of the first day of the month following the Commission's decision and Order on Verizon's § 271 application in this case. For example, if this Commission Order is issued in this case in December 2002, then Verizon will begin collecting PAP metrics data as of January 1, 2003 and report that data in February 2003.

Recommended Conclusions of Law

- 1. This Commission will not support Verizon WV's 271 application before the FCC unless Verizon WV affirmatively waives any future legal challenge to the PAP and PAP revisions premised on the Commission's lack of authority to impose or revise the PAP.¹¹⁵
- 2. The PAP as filed by Verizon is adopted with an effective date as of the first day of the month following the date of this Order.

AT&T is not suggesting that Verizon waive all rights to challenge future revisions to the PAP. AT&T's position is only that Verizon waive any challenge to the adoption of the PAP that Verizon relies on to buttress its 271 application in West Virginia, and revisions to the PAP under the PAP's change provisions, that is based on the Commission's authority or lack thereof,.

CONCLUSION

Before the Commission considers endorsing Verizon West Virginia's 271 application it should first direct Verizon to lower its UNE rates to the levels recommended by AT&T and require Verizon to complete the remaining list of tasks necessary to bring meaningful local exchange competition to the West Virginia consumers who desperately need it. (see pp. 2-3; Sections B through I, *infra.*) The Commission should not accept mere promises from Verizon that it will 'fix" its problems at some unspecified point in the future. Rather, the Commission should require, in its order in this proceeding, that Verizon provide a firm and hard commitment to each of the action items AT&T has identified in this brief. Unless and until Verizon makes that commitment, this Commission should not endorse Verizon's 271 application to the FCC.

Respectfully submitted,

AT&T Communications of West Virginia, Inc.

Mark A. Keffer (WV Bar No. 1988) Michael McRae Ivars V. Mellups AT&T Communications of West Virginia, Inc. 3033 Chain Bridge Road Oakton, Virginia 22185 (703) 691-6046 Robert R. Rodecker (WV Bar No. 3145) BB&T Square – Suite 1230 P.O. Box 3713 Charleston, West Virginia 25337 (304) 343-1654